'Don't Blame the Librarian if No One Has Written the Book': *My Vote Counts* and the Information Required to Exercise the Franchise

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I Introduction

The success of the South African Constitutional project is in large part dependant on how well South Africans manage to turn the key values of transparency, accountability and participation, underlying the Constitution,[1] into real-life practice.[2] The right of access to information, and its exercise and implementation are central to the achievement of these values. The Preamble to the Promotion of Access to Information Act[3] (PAIA) – the law enacted to give effect to the constitutional right of access to information – notes in particular how the secrecy and unresponsiveness of the previous system of government in South Africa led to an abuse of power and the violation of human rights. With the enactment of this law, Parliament committed South Africa to a new culture of transparency and accountability – a culture to be fostered across the board in all institutions, whether public or private. More particularly, PAIA, and the legislative framework within which it fits, has been enacted to ensure the accessibility of information that people require in order to be able to exercise and protect any other rights.[4]

That is the ideal. South Africa is, however still some way away from achieving this ideal. The Access to Information Network (ATI Network) (formerly the PAIA Civil Society Network) – a South African civil society organisation advocating around the right of access to information – reports significantly low levels of compliance with PAIA. For instance, the network reported in 2016 that only 40 per cent of

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[1] Constitution of the Republic of South Africa, 1996.

[2] D Davis 'Corruption and Transparency' (2010) 2–3, available at http://www.opendemocracy.org.za/wp-content/uploads/2010/10/Corruption-and-Transparencyby-Judge-Dennis-Davis.pdf (accessed on 18 June 2018).

[3] Act 2 of 2000.

[4] PAIA preamble.

requests for information, that were made in terms of PAIA by network members, were responded to within the 30-day period provided for in the Act.[5] While there has been some improvement over time,[6] a failure in 60 per cent of all instances in 2016, 15 years since the enactment of PAIA, to provide a timely response to formal access to information requests, seems to indicate that there is still some way to go toward achieving the goal of instilling a culture of transparency.[7]

Access to information has a crucial role to play in enhancing democracy. The relationship between access to information and democracy is raised strongly by the question of whether individuals are entitled know about who funds political parties. Within the context of political party funding, the role of access to information in ensuring transparency, accountability and participation came before the Constitutional Court, recently, in *My Vote Counts NPC v Speaker of the National Assembly & Others*[8] (*My Vote Counts 1*). *My Vote Counts 1* turned on whether and how access should be granted to information about the private funding of political parties. The minority found that such information should be made accessible and that access should be granted through legislation enacted specifically for that purpose. Such legislation, the minority found, should be enacted in terms of the duty imposed on Parliament in s 32(2) of the Constitution. Section 32(2) requires that Parliament enact legislation that gives effect to the s 32(1) right of access to information.

The majority, by contrast, found that Parliament had already enacted legislation in compliance with its duty under s 32(2) of the Constitution, namely, PAIA. It held that the legal principle of 'subsidiarity', as developed by the Constitutional Court, prevented My Vote Counts (MVC) from relying directly on the right in s 32. Instead, MVC had to challenge the constitutionality of PAIA to the extent that it contended that PAIA is not sufficient to give effect to s 32(1).[9] As such, the majority never engaged the question of whether information about the private funding of political parties should be accessible. But its judgment can be understood to suggest that – to the extent that information should be accessible – PAIA must be amended to achieve that end.

In this paper, I will consider whether information about private funding of political parties is in fact, currently, accessible in South Africa, and if not, whether the Constitution requires that it should be accessible. To be able to answer these questions I will first have to answer a number of other questions and address them in three parts.

[5] C Reddell *Shadow Report 2016* (2017) 2–4, available at http://foip.saha.org.za/uploads/images/CERShadowReport2016Final%20(1).pdf. In 2015 that figure stood at just 30 per cent, in 2014 at 37 per cent, in 2013 at 22 per cent, in 2011 (there was no report issued for 2012) at 25 per cent, in 2010 at 21 per cent and in 2009 at 12.7 per cent

[6] In 2015 that figure stood at just 30 per cent, in 2014 at 37 per cent, in 2013 at 22 per cent, in 2011 (there was no report issued for 2012) at 25 per cent, in 2010 at 21 per cent and in 2009 at 12.7 per cent. The reports for these years are all available at http://foip.saha.org.za.

[7] Reddell (note 5 above) 2–4. See also K Allen 'Applying PAIA: Legal, Political and Contextual Issues' in K Allen (ed) *Paper Wars* (2009) 171–172.

[8] [2015] ZACC 31, 2016 (1) SA 132 (CC), 2015 (12) BCLR 1407 (CC).

[9] MVC is a non-profit organisation that campaigns to 'improve the accountability, transparency and inclusiveness of elections and politics in South Africa'. See http://www.myvotecounts.org.za/about/ (accessed on 15 January 2017).

I start, in the first part of this paper, by considering how the legislative framework, underlying access to information in South Africa works. I will demonstrate that PAIA, as the legislation enacted to give effect to the right of access to information, acts as a mechanism for access to information that is recorded in some form or another. The mechanism, however, depends on the creation and accessible storage – or management – of records of information. I will then show that record-creation and record-keeping duties arise in other, 'sector-specific', legislation. More specifically, I will demonstrate that legislation within the electoral legislative scheme does give indirect recognition to an access to information element to the right to vote by imposing record-creation and record-keeping duties. The legislation within the electoral legislative scheme in fact even recognises, in certain instances, a duty to ensure that recorded information proactively be made publicly accessible – that is, without the need for a formal access to information request.

Once I have demonstrated how the access to information legislative framework underlying access to information in South Africa works, it will become possible to turn to answering the question about whether information about private funding of political parties is in fact, currently, accessible. I will indicate that there is no duty in the legislation within the electoral legislative scheme – the sector-specific legislation – or otherwise, to keep a record of information about private funding of political parties. I will show that, as long as information is not recorded, it is not possible to request such information under PAIA. Information about private funding of political parties is therefore, largely, not currently accessible. The mechanism for access, PAIA, in order to ensure access, depends on a duty to create records containing this information, and no such duty exists in relation to the private funding of political parties.

I will then turn to answering, in the second part of the paper, the question about whether the Constitution requires that information about private funding of political parties should be accessible. In order to answer this question, it is necessary to first determine under which right such a duty to make information about private funding of political parties accessible might arise. I will show that, in line with the principle of subsidiarity, the right implicated in this question is the right to vote and not the right of access to information. I therefore suggest that the proper location for duties to create and keep, and in certain instances to proactively disclose, records of information related to voting (if this information is required for the exercise and protection of the right to vote) is in the legislation enacted to give effect to the right to vote.

In order to determine then, whether information about private funding of political parties is required for the exercise and protection of the right to vote I will analyse, in the second part of this paper, the content given to the right to vote by international law and by the South African Constitutional Court and legislature. I will also, in light of similar constitutional protections, and as disclosure laws have for many years formed part of campaign finance regulation in the United States of America (US), briefly consider the case law of the US Supreme Court, related to disclosure and campaign finance. I will provide three arguments for the recognition of a right of access to information about private funding of political

parties as part of the right to vote. The first argument relates to South Africa's obligation under art 10(b) of the African Union Convention on Preventing and Combating Corruption[10] to, in order to combat corruption, 'incorporate the principle of transparency into funding of political parties'. Access to information about funding makes it possible to identify instances of quid pro quo corruption and knowledge of potential exposure will act as a deterrent to corrupt activity. The second argument for the recognition of such a right relates to South Africa's constitutional and international law duty, to ensure that the exercise of the right to vote is meaningful. Access to information about political party funding makes it possible for voters to determine what sort of pressure political parties will be under from funders with respect to issues that may affect community members. This knowledge will inform debate, which in turn will ensure meaningful exercise of the right to vote. The last argument provided relates to the recognition by the Constitutional Court of a duty to ensure that inequality of access to politicians is counter-balanced. Again, knowledge about what sort of pressure political parties will be under, from funders, with respect to issues that may affect voters provides voters with the opportunity to identify, and therefore vote for, the party that will best serve their interests.

In light of the importance of ensuring access to information about private funding of political parties (in order to combat corruption, ensure the meaningful exercise of the right to vote and ensure that inequality of access to politicians is counter-balanced) it is clear the information must be easily accessible. I will demonstrate that the high costs and heavy burden of access to this information using formal access to information requests taken together with the importance of access to this information necessitates a need for the information to be made proactively available. I will therefore argue that the legislature ought to create a duty within the legislation forming part of the electoral legislative scheme to record, and proactively grant access to, information about the private funding of political parties.

I will then consider, in the third part of the paper, whether such a provision within the electoral legislative scheme, requiring the recording of, and proactive granting of access to, information about the private funding of political parties, may place any limits on other constitutional rights. I will show that such a provision would infringe on the privacy rights of donors (natural and juristic) as well as the privacy rights of political parties. Lastly, I will consider whether such an infringement of the privacy rights of donors and political parties would be constitutionally justifiable in terms of s 36 of the Constitution. I will show that the limitation would in fact be reasonable and justifiable.

[10] Signed and ratified by South Africa, available at http://www.au.int/en/treaties/african-union-convention-preventing-and-combating-corruption (accessed on 24 September 2016).

II The Legislative Framework Underlying Access to Information in South Africa

A Introduction

PAIA, provides access to information by focusing on the notion of 'records' rather than 'information'. 'Records' are defined in the National Archives and Record Service of South Africa Act[11] (NARSA) as 'recorded information regardless of form or medium'.[12] The definition in PAIA is identical except that it adds that it applies with respect to a 'public body' or 'private body' (terms defined in PAIA) that holds or controls such recorded information, irrespective of whether it was created by that body, or not.[13]

Whereas PAIA (similar to the US Freedom of Information Act)[14] allows for requests for records that hold information, the United Kingdom's (UK) Freedom of Information Act[15] allows requests for information – requests that require a written response. For example, if you wish to know who in the police leadership is responsible for public order policing you would, in the UK, simply ask the police department for an indication of who is responsible; in South Africa or in the US you would need to ask for a copy of a record – such as an organogram – containing that information.[16]

The downside of granting access through records is that a failure to create or keep records (or to keep them in an accessible manner) stifles the exercise of the right of access to information. This is a reality that the ATI Network has consistently highlighted, with respect to PAIA, over a number of years. The ATI Network reports that the primary reason provided for the refusal of access to information is that the records requested either could not be found or do not exist.[17] This problem, however, also surfaces in countries where access is granted to 'information' rather than 'records' as the information provided in response to

[11] Act 43 of 1996.

[12] NARSA s 1.

[13] PAIA s 1.

[14] 5 US Code § 552.

[15] Act 2000 (cl 36).

[16] See an example of such a request submitted by the South African History Archive Trust (SAHA) available at http://foip.saha.org.za/request_tracker/entry/sah-2015-sap-0013 (accessed on 6 October 2016).

[17] PAIA Civil Society Network *PAIA Civil Society Network Shadow Report: 2010* (2010), available at cer.org.za/wp-content/uploads/2017/03/PAIAShadowReport2010Final.pdf (accessed on 28 June 2018) 1; C Kennedy *PAIA Civil Society Network Shadow Report: 2013* (2013) 5, available at http://foip.saha.org.za/uploads/images/PCSN_ShadowRep2013_final_20131029.pdf (accessed on 6 October 2016); C Kennedy *PAIA Civil Society Network Shadow Report: 2014* (2014) 6, available at http://foip.saha.org.za/uploads/images/PCSN_ShadowRep2014_final_20150202.pdf (accessed on 6 October 2016); M Belalba-Barreto, K Patel & L Chamberlain *PAIA Civil Society Network Shadow Report: 2015* (2017) 8, available at http://foip.saha.org.za/uploads/images/PAIA%20Civil%20Society%20Network%202015%20Shadow%20Report.pdf (accessed on 29 August 2017) 3.

access to information requests usually needs to be sourced from records.[18] The virtue of gaining access to the original underlying records or source documents – as opposed to simply written responses from governmental officials – is that the information provided is verifiable.[19]

PAIA recognises two forms of access to records. First, access can be gained by way of a formal request for access made either in terms of PAIA or in terms of other legislation providing for access and which is not less restrictive than, and not inconsistent with, PAIA.[20] Second, access can be gained automatically, without any need for a formal request.[21] This latter form of access is known as 'proactive disclosure'. Records can be made proactively available either on a voluntary basis or because of a proactive disclosure duty arising from another piece of legislation.[22] Where records are available proactively, PAIA requires that information about those records, and how they can be accessed, be published in a notice that must be made publicly accessible.[23] The 'Records Management Policy Manual' – issued by the National Archivist in terms of the provisions of NARSA – notes that records and record-keeping play a critical role, not only in ensuring accountability but also in ensuring good governance and service delivery.[24]

The South African courts have also recognised the value of record-keeping. Judge Tlhapi, sitting in the High Court in Pretoria, delivered a judgment in favour of the Applicants in the matter of *Mail & Guardian Centre for Investigative Journalism v Minister of Public Works*.[25] The matter arose out of an access to information request, made by the applicants in terms of PAIA, for records related to improvements to the President's homestead in Nkandla. The court found the respondents' arguments that there were no records with information about the decisions taken

[18] See R Wilkinson 'David Cameron aides using WhatsApp "to avoid transparency laws" over EU referendum' *The Independent Online* (27 April 2016), available at http://www.independent.co.uk/news/uk/politics/david-camerons-eu-remain-camp-using-whatsapp-to-avoid-transparency-laws-a7002791.html (accessed on 6 October 2016)(a recent media report about British politicians using encrypted messaging in order to avoid disclosure of information under access to information laws).

[19] See, for example, P Alexander, C Runciman & B Maruping *South African Police Service (SAPS) Data on Crowd Incidents: A Preliminary Analysis* (2015) https://africacheck.org/wp-content/uploads/2015/06/South-African-Police-Service-Data-on-Crowd-Incidents-Report.pdf (6 October 2016)(The report looks at data from the South African Police Service's Incident Registration Information System (IRIS), obtained by SAHA through the submission of a PAIA request, and finds that in its reports the SAPS had misrepresented the data. See, for example, ibid at 58.) See also P Alexander, C Runciman & B Maruping 'The Use and Abuse of Police Data in Protest Analysis South Africa's Incident Registration Information System (IRIS)' (2016) 58 *SA Crime Quarterly* 9.

[20] PAIA ss 5, 11 and 50.

[21] PAIA ss 15 and 52.

[22] See, for example, Municipal Systems Act 32 of 2000 s 25(4)(a)(MSA)(provides that a municipality's Integrated Development Plan must be made publicly accessible. Section 21A of the MSA further provides that all records that municipalities are required to make available proactively must be made available at the municipality's head and satellite offices and libraries as well as on its official website. To the extent that it cannot afford a website s 21B provides that the relevant records must be provided for display, on a website sponsored by National Treasury.)

[23] See PAIA ss 15 and 52.

[24] National Archives and Records Service of South Africa *Records Management Policy Manual* (2007), available at http://www.national.archives.gov.za/rms/Records_Management_Policy_Manual_October_2007.pdf (accessed on 6 October 2016) 1.

[25] [2014] ZAGPPHC 226.

with regard to improvements at Nkandla – which decisions were made at a high level of management and with serious financial implications – to be unacceptable, holding that the

> [f]ailure to keep record or a tendency to lose documents, or to hide them or to deal with government business under a cloud of secrecy where it is not justified or, like in this matter to confine disclosure to the project managers documents, in situations where a government department is taken to task or where the shoe might pinch certain officials in government, constitutes a dereliction of one of the most important obligations on a government, which is to keep proper records. Such conduct on the part of government does not advance the values espoused in our Constitution, that of a democratic, transparent and accountable government. It is in the public interest to keep record in order to give credence to the business of government itself and to those who govern.[26]

The Auditor-General of South Africa (AGSA) also recognises the critical role that record-keeping plays in good governance. Record-keeping is one of the criteria used by the AGSA in evaluating internal control with respect to financial and performance management. The Regulations to the Public Audit Act[27] therefore require that institutions subject to audit by the AGSA keep 'proper' and 'timely' records, in order 'to ensure complete, relevant and accurate information [that] is accessible and available to support financial and performance reporting'.[28] A 2012 study which analysed data from the AGSA's consolidated audit reports for the 2005/06 through to the 2009/10 financial years found that the most common cause for an adverse finding relating to the finance of organs of state over that period was a failure with respect to record-keeping.[29]

PAIA therefore is a mechanism for access, granting access to recorded information, whether in terms of a request or proactively. The mechanism, critically, depends on the creation and accessible storage – or management – of records. Record-creation and record-keeping duties, however, arise in other, sector-specific legislation. The neologism, 'sector-specific legislation', denotes legislation and other forms of law aimed at giving effect to constitutional rights and designed to regulate distinct areas of social, economic and political life – from contracts, to marriage, to labour, to education, to security services and to, yes, voting rights.

This terminological distinction sits at the very core of this paper's argument: different sectors, and the rights that govern them, require that certain information, essential within that sector, be recorded. In some instances, the public interest may require that this very important information be easily accessible – that might be, for instance, because the information is essential for the full realisation of, or for the protection of, a right. In such instances the sector-specific legislation will usually also require that the information be automatically, or 'proactively'

[26] Ibid at para 35.
[27] Act 25 of 2004.
[28] Addendum A to Regulation 263 of 2014 in *Government Gazette* 37505 (2 April 2014).
[29] M Ngoepe & P Ngulube 'Contribution of Record-keeping to Audit Opinions: An Informetrics Analysis of the Gerenral (sic) Reports on Audit outcomes of the Auditor-General of South Africa' (2013) 32 *Journal of the Eastern and Southern Africa Regional Branch of the International Council on Archives* 52 at 52.

disclosed – that is, disclosed without the need for a formal access to information request. The information required by participants in the financial sector is quite different from the information we require for oversight of our security services or our electoral system.

There are also other questions which arise in addition to what information should be recorded in a particular sector: for instance, the manner in which information should be recorded, how it should be disclosed and how long it should be preserved will be different for different facets of society. The point is, yet again: neither s 32 of the Constitution – an overarching constitutional right – nor PAIA – framework legislation – could possibly serve these fine but critical distinctions. Record-creation and record-keeping duties are specific for each sector and the proper location for such duties is in the sector-specific legislation rather than in the framework legislation. Said in a different way, the duties to create and keep – and in certain instances to proactively disclose – records of information that are important within a specialist field, should be recognised within the right or legislation governing that sector.

On a broad level, there is legislation creating overarching record-keeping duties for public bodies. On a sector-specific level, there are numerous pieces of legislation that impose record-creation and/or record-keeping duties on institutions and individuals in the public and in the private sector. In the part that follows I will give an overview of what that legislative framework looks like. It is by no means an attempt at an exhaustive list of all legislation with record-creating and record-keeping duties. In fact, the Auditor General – in a 2012 presentation – estimated that there are over 800 such pieces of such legislation.[30] This attempt is instead intended to illustrate how records-related legislation fits into the access to information legal framework.

B Record-creation and Record-keeping Duties imposed on the Public Sector

NARSA was enacted in part to ensure the preservation of any records, public or private, with 'enduring value', proper management and care of all public records and the promotion of records management.[31] It applies to all bodies in the national sphere of government, and in so far as no provincial archive has been established within any province in the country, also to all bodies (within the provincial and local sphere of government) in that province.[32]

South Africa is not the only country that locates high-level records management duties outside of access to information legislation. According to the Global Right to Information Rating[33] out of 105 countries surveyed, only 36 (34 per cent) have – in their access to information legislation – record management

[30] M Dlamini *Records Management and the Law* (26 November 2012), available at http://slideplayer.com/slide/5732128/ (accessed on 28 June 2018).

[31] NARSA preamble and s 3(C).

[32] NARSA s 16(1).

[33] An online programme (founded by Access Info Europe and the Centre for Law and Democracy that compares legal frameworks for access to information from various countries across the world).

(or, record-keeping) standards.[34] In South Africa, unlike those 36 countries, the high-level duty on state entities to keep information in an accessible manner arises in NARSA, rather than in PAIA. NARSA provides for the determination, by the National Archivist, of classification systems for records, which, if complied with will ensure easy access to records. It also provides for the issuance by the National Archivist of directives and instructions for the management and care of public records.[35] Regulations issued in terms of NARSA, by the Minster of Arts, Culture, Science and Technology, are deemed a part of the Act.[36] NARSA requires that an official be designated in every public body that will be responsible for compliance, by that body, with the requirements of the Act. It is a criminal offence under NARSA to remove, destroy or erase any record, public or non-public, under the control of a public body other than in terms of processes provided for in NARSA and its Regulations.[37]

One of the express objectives of PAIA is the promotion of transparency, accountability and effective governance.[38] Interestingly the Public Finance Management Act[39] (PFMA) and the Municipal Finance Management Act[40] (MFMA) have very similar express objectives of ensuring transparency and accountability – but specifically, in the management of public finance.[41] These Acts directly impose a number of record-creation duties. The MFMA, for instance, requires that an authorisation to withdraw money from a municipal bank account must be reduced to writing and that a report must be issued on a quarterly basis on all withdrawals made out of a municipal account.[42] Annually, municipalities (in terms of the MFMA) and provinces (in terms of provisions in the PFMA) are required to create a budget.[43]

These are just a few provisions out of just three pieces of legislation that apply to the public sector. But they serve to illustrate that, while PAIA is a mechanism for access, the duty to create the records sits in the sector-specific legislation – in

[34] Centre for Law and Democracy *Global Right to Information Rating*, available at http://www.rti-rating.org/by-indicator/?indicator=57 (23 July 2016).

[35] NARSA ss 13(2)(i) and 13(4).

[36] See the definition of 'this Act' in NARSA s 1. Regulations provided for in NARSA s 13(3).

[37] NARSA s 16(1).

[38] NARSA s 9(e).

[39] Act 1 of 1999.

[40] Act 56 of 2003.

[41] PFMA s 2 and MFMA s 2(a).

[42] MFMA ss 11(1), 11(3) and 12(4)(a).

[43] MFMA Chapter 4 and PFMA s 18(1)(a). Further examples would include: annually, municipalities are required to record, in writing, detail about investments held by them – including detail about the opening and closing balances for such investments (MFMA s 13(4)(a)); MFMA s 31(d) requires that any approval for the expenditure of funds in excess of that budgeted for a specific project be recorded in writing; the PFMA requires of every institution to which its provisions apply to prepare, annually, consolidated financial statements (PFMA ss 8 and 19(1)); all delegations of duties, conferred originally on National Treasury, to a department of National Treasury and all authorisation provided by National Treasury to any provincial government for participation in a company not wholly owned by that province must be recorded in writing (PFMA ss 10(1)(a) and 23(2)); and within 14 days of the provision of authorisation for emergency funding, the PFMA requires that a report be created on the emergency funding (PFMA s 16(4)).

this instance, public finance legislation. The record-keeping duties are situated, with respect to public institutions, in NARSA.

C Record-creation and Record-keeping Duties Imposed on the Private Sector

In the private sector, too, there is legislation establishing record-creation and record-keeping duties. To illustrate this point, I outline below just a few record-creation and record-keeping duties, arising in legislation related to the specialist areas of company law, labour relations and elections.

1 *Company Law*

The Companies Act[44] applies to both private and state-owned companies.[45] The Companies Act requires that Memoranda of Incorporation, company rules, securities registers and registers of disclosure with respect to 'regulated companies' be kept indefinitely. All other information a company is required, in terms of the Act, to keep, must be kept for at least seven years.[46] The Companies Act – the sector-specific legislation – therefore contains record-keeping duties, not only for the state, but also for institutions in the private sector. The Act also has record-creation duties that it imposes on institutions in both the public and the private sector. The Commissioner of the Companies and Intellectual Property Commission is, for instance, required to issue registration certificates with respect to every company whose Notice of Incorporation, and every foreign company whose application, is accepted by the Commission.[47] The Act also requires companies to annually prepare financial statements and to minute shareholders' and directors' meetings and to ensure that all resolutions taken by either shareholders or directors are recorded.[48]

2 *Labour Relations*

The various pieces of legislation aimed at realising the constitutional right to fair labour practices also have key provisions providing for the recording of information.[49] In terms of s 81 of the Compensation for Occupational Injuries and Diseases Act[50] (COIDA) employers must keep records of employees' earnings and other prescribed information, for a period of at least four years.[51] Records 'necessary for the exercise of proper control over the compensation fund' must

[44] Act 71 of 2008.
[45] Companies Act s 8.
[46] Companies Act ss 24(1), 24(3)(a), 24(4)(a) and 56(7).
[47] Companies Act s 14(1)(b)(iii).
[48] Companies Act s 24(3)(c), (d) and (f).
[49] Constitution s 23.
[50] Act 130 of 1993.
[51] COIDA s 81.

be prepared annually.[52] In the event of a hearing with respect to a compensation claim, a record, of the proceedings, must be created.[53]

In furtherance of its objectives of advancing economic development, social justice, labour peace and the democratisation of the workplace, the Labour Relations Act[54] (LRA) similarly requires that certain records be created and kept in an accessible manner.[55] Section 54 of the LRA requires, for instance, that every bargaining council and every statutory council keep minutes of its meetings – for a minimum of three years.[56] All registered trade unions and employers' organisations are required to 'keep book … of its income, expenditure, assets and liabilities', create and keep a list of its members, minute its meetings and retain, for at least three years from the date of a ballot, all ballot papers.[57]

3 *Elections*

In *My Vote Counts 1*, which will be discussed shortly in detail, the Constitutional Court was concerned with information relating to the right to vote, so the question arises: does the electoral legislative scheme also provide for record-creation and record-keeping duties? The answer is yes. Even with respect to elections there are a number of record-creation and record-keeping duties that enable access to information and, ultimately, enable the exercise and protection of the various political rights in s 19 of the Constitution – including, the right to vote. To this end, the Electoral Act[58] – specifically aimed at giving effect to constitutional declarations, guarantees and responsibilities in relation to national, provincial and local elections – requires the recording of every objection raised with respect to a specific person voting, as well as the decision on that objection.[59] Similarly, objections with respect to the counting of votes and the determination of provisional results must be recorded, in terms of s 49(7). Records must also be kept of any irregularities and discrepancies, with respect to the counting of votes, as well as of how those issues were dealt with.[60] The Electoral Commission is required to keep a map of voting districts.[61] The fact that an individual has cast her ballot must be recorded.[62] Results of elections must be recorded, and then declared publicly.[63]

The Local Government Municipal Electoral Act[64] (LGMEA) also aims to give effect to 'constitutional declarations, guarantees and responsibilities' related

[52] COIDA s 20.
[53] COIDA s 45(7).
[54] Act 66 of 1995.
[55] LRA s 1.
[56] LRA s 54.
[57] LRA ss 98–99.
[58] Act 73 of 1998.
[59] Electoral Act ss 2 and 41.
[60] Electoral Act s 52(5).
[61] Electoral Act s 60.
[62] Electoral Act s 38(5).
[63] Electoral Act s 50.
[64] Act 27 of 2000.

to municipal elections.[65] To ensure the realisation of these goals, the LGMEA requires, for instance, that lists be created, certified and kept of all parties contesting municipal elections and candidates contesting ward elections.[66] As with national elections, objections to specific voters voting, and identified and alleged irregularities and discrepancies – as well as steps taken to address those – must be recorded in writing.[67] The fact that an individual has cast her ballot must be recorded.[68] Results of elections must be recorded, and then declared publicly.[69]

Even duties to ensure the *proactive release* of records of information related to the realisation of constitutionally-guaranteed political rights, are seated within this sector-specific legislation. For instance, the Electoral Act requires that a 'national common voters' roll' be compiled, maintained *and made available for inspection at the offices of the Electoral Commission*.[70] Decisions to postpone voting at any given voting station, or an allowance for a revote, must not only be made public but must be published in the media, ensuring a wide reach.[71] The lists of candidates and maps of voting districts that are required to be created must not only be available for inspection, but notice of their availability must similarly be published in the media.[72] Voting hours, other than as provided for in the Electoral Act, must also be so published.[73] Other notices that must be publicised include: notices of relocation of voting stations – in case of an emergency – and notices of routes for, and estimated stopping times of, mobile voting stations.[74] In terms of s 111 of the Electoral Act, steps must also be taken to ensure that any record, that must be proactively available in terms of the provisions of the Act, is also made available electronically.[75]

[65] LGMEA s 2.
[66] LGMEA ss 15 and 18.
[67] LGMEA ss 51, 58 and 62.
[68] LGMEA s 4.
[69] LGMEA s 64. The Electoral Commission Act 51 of 1996, providing for the establishment of the Electoral Commission (Preamble and s 4), also contains record-creation and record-keeping duties. For instance, any person, attending any meeting of the Commission, that holds any financial or other interest that might create a conflict of interest, that is, an interest that will prevent that person from performing functions or duties imposed on them by the Act in a fair or impartial way, may not be present at or participate in that meeting (Electoral Commission Act s 10(1)). Should any person appear to have such an interest, they are required to disclose the interest, and to allow remaining members, separately, to determine whether the interest indeed creates a conflict of interest. Every such declaration and determination must be recorded within the minutes of the meeting (Electoral Commission Act s 10(2)). The Commission is also required to keep records of its financial accounting (Electoral Commission Act s 12(2)).
[70] Electoral Act ss 5 and 16.
[71] Electoral Act ss 22 and 23. See also, similar provisions with respect to municipal elections in LGMEA ss 9 and 10.
[72] Electoral Act ss 29(1), 29(2), 63(1) and 63(2) and LGMEA ss 20 and 22.
[73] Electoral Act s 36.
[74] Electoral Act ss 65 and 69.
[75] See also similar provisions with respect to municipal elections in LGMEA s 85.

D Does PAIA Ensure Access to Information about Private Funding of Political Parties?

It is clear from the discussion in this part of the paper that PAIA acts as a mechanism for gaining access to recorded information. Record-creation and record-keeping duties, and – where appropriate – duties to make records proactively available to the public are situated in sector-specific legislation. To answer the question whether PAIA ensures access to information about the private funding of political parties, we therefore first have to look more broadly to the general access-to-information scheme.

With respect to voting rights, the sector-specific legislation that would contain the relevant record-creation, keeping and proactive release duties are the Electoral Act, LGMEA and Electoral Commission Act. The first question is therefore whether a duty exists within the sector-specific legislation to record information about the private funding of political parties. The answer to that question is no. The access to information legislative scheme as it stands therefore does not ensure access to information about the private funding of political parties.

Put simply, PAIA depends on a duty to create records, but no such record-creating duty exists within the electoral legislative framework.

E Conclusion

Parliament chose, with the enactment of PAIA, to give effect to the right of access to information, by providing a mechanism for accessing records – records that are created and kept in terms of duties imposed in other sector-specific legislation. The minority in *My Vote Counts 1* in fact, recognised that there is a 'range of legislation' that gives effect to the right of access to information, not only PAIA.[76] However, in finding that this means that all of these pieces of legislation are enacted in terms of s 32 of the Constitution, the *My Vote Counts 1* minority erred. In fact, while record-creation and record-keeping duties clearly relate to the right of access to information and fit within the legislative scheme of access – they are sector-specific, relating to specialist fields. These record-creation and record-keeping duties are located in pieces of legislation aimed at giving effect to other fundamental rights and public interest concerns. These other rights and concerns, as I will show below with respect to the right to vote, in fact, have access to information elements. The legislation giving effect to those rights and interests must – and usually do – contain the related record-creation and record-keeping duties. Where information must be readily accessible, in order to give full effect to a right, a duty proactively to make records of that information available should also be contained in the sector-specific legislation. It is clear from the discussion so far that, with respect to political rights – and more specifically the right to vote, the duties to create and keep records are seated in the sector-specific legislation, designed to give effect to those rights, and not in PAIA or in other legislation aimed specifically at granting access to information. This legislation does not however contain any record-creation or record-keeping duties with respect to

[76] *My Vote Counts 1* (note 8 above) at para 67.

information about the private funding of political parties. So, as it stands, there is no guaranteed access, under the existing access to information legislative scheme, to this information.

III Identifying the Right more Directly Implicated

A The Role of the Principle of Subsidiarity

In the previous part, I demonstrated that Parliament's chosen model for access to information situates PAIA as a mechanism (or an instrument) for access to information – information that is captured or recorded in one form or another. This model necessarily depends on duties contained in sector-specific legislation to create and preserve records of information. In some instances, there is a further duty to make the relevant information proactively available to the public – that is, without the need for a formal access to information request. In my view this model is in keeping with one of the forms, or aspects, of 'constitutional subsidiarity'. In *My Vote Counts 1* the minority judgment noted that 'constitutional subsidiarity' refers to 'a hierarchical ordering of institutions, of norms, of principles, or of remedies, and signifies that the central institution, or higher norm, should be invoked only where the more local institution, or concrete norm, or detailed principle or remedy, does not avail'.[77]

Van der Walt suggested that constitutional subsidiarity derives from the Constitutional Court's holding, in a number of cases, that South Africa has one system of law, derived from and shaped by the Constitution.[78] The principles of subsidiarity prevent the creation of multiple systems of law, by preventing reliance, by litigants, on the source of law that best supports their cause.[79] If litigants were free to choose to rely on whichever source of law (the Constitution directly, legislation, customary law or common law) best supported their cause then, in situations with very similar factual and legal issues, some people might choose to frame their cause of action as being a constitutional issue while others may choose to frame it as a legislative issue.[80] This is problematic because if different litigants could rely on any one of different sources of law the result would be the development of 'parallel fields of law' all dealing with the same issue in different ways.[81] Marais and Maree highlight the example of a litigant relying on their constitutional right to compensation for expropriation instead of their legislated right to have the unjust administrative action that lead to the expropriation, set aside.[82] The court's endorsement in that case of this action created 'parallel fields of law' making it possible for future litigants in similar circumstances to either

[77] Ibid at para 46.

[78] A Van der Walt *Property and Constitution* (2012) 20 at 35. See also A Van der Walt 'Normative Pluralism and Anarchy: Reflections on the 2007 Term' (2008) 2 *Constitutional Court Review* 77 at 90–98.

[79] Van der Walt *Property and Constitution* (note 78 above) at 38.

[80] Ibid.

[81] E Marais & P Maree 'At the Intersection between Expropriation Law and Administrative Law: Two Critical Views on the Constitutional Court's *Arun* Judgment' (2016) *Potchefstroom Electronic Law Journal* 1 at 19–20 and Van der Walt *Property and Constitution* (note 78 above) at 16 and 62–32.

[82] Marais & Maree (note 81 above) at 24–25 and 54.

have the unjust administrative action set aside, in terms of legislation, or to claim compensation under the Constitution.[83]

The principle of subsidiarity by contrast requires that litigants rely on the source of law (out of all the sources that have a bearing on the facts of their case) that is the most specific, concrete or detailed. Higher norms should only be invoked to give content to the more specific rules. Therefore where there is common law or legislation dealing with an issue related to a fundamental human right recognised in the Bill of Rights,[84] a litigant must, in compliance with the principle of subsidiarity, rely on the common law principle or legislation; the Constitution, and more specifically the constitutional right, will inform the interpretation of the common law principle or the legislation.[85] The Constitution could still be relied on directly, if the common law principle or legislation was in conflict with the Constitution or failed to give full effect to a constitutional right, but only in those circumstances. Subsidiarity therefore does not require of us to ignore some sources of law, but does tell us where to start when there is more than one source of law applicable in a given situation, and what roles the different sources play.[86]

Justice Cameron in *My Vote Counts 1* provides detail with respect to five forms of constitutional subsidiarity that have been recognised in South African constitutional law.[87] Two of these forms of subsidiarity are relevant to this analysis, one because it was relied on by the majority in *My Vote Counts 1* and the other because – as I will show – it should have been relied on. I will only discuss these two, relevant forms or aspects of subsidiarity.

The form of subsidiarity relied on by the majority in *My Vote Counts 1* applies in circumstances where the legislature has enacted legislation with the intention of giving effect, through that legislation, to a fundamental right in the Constitution.[88] In such circumstances, the principle of constitutional subsidiarity requires of a litigant either to rely on the legislation in order to exercise or protect their right or to challenge the constitutionality of the legislation in so far as it does not provide for the exercise or protection of all aspects of that fundamental right.[89] In *My Vote Counts 1*, the applicant argued that access to information about the private funding of political parties is required to enable the effective exercise of the right to vote.[90] On this basis the applicant wished to place reliance on the constitutional right of access to information, as contained in s 32(1) of the Constitution, in order to seek an order for the enactment of legislation, in terms of s 32(2) of the Constitution that would provide access to information about the

[83] Ibid at 20.
[84] Constitution Chapter 2.
[85] Van der Walt (note 78 above) at 85.
[86] Marais & Maree (note 81 above) at 25.
[87] *My Vote Counts 1* (note 8 above) at paras 47–53 and 61–63.
[88] Ibid at para 53 and Van der Walt *Property and Constitution* (note 78 above) at 40.
[89] *My Vote Counts 1* (note 8 above) at para 53 and Van der Walt *Property and Constitution* (note 78 above) at 36.
[90] M du Plessis *Applicant's Heads of Argument* (2018) available at https://collections.concourt.org.za/bitstream/handle/20.500.12144/34577/Applicant%27s%20Heads%20of%20Argument.pdf?sequence=8&isAllowed=y (accessed on 27 November 2016) at para 9 and *My Vote Counts 1* (note 8 above) at para 127.

private funding of political parties.[91] Section 32(1) of the Constitution provides that:

> Everyone has the right of access to —
> (a) any information held by the state; and
> (b) any information that is held by another person and that is required for the exercise or protection of any rights.

Section 32(2) of the Constitution requires of Parliament to enact legislation to give effect to the right contained in s 32(1).

The applicant's case was that while PAIA had been enacted in terms of s 32(2) of the Constitution to give effect to right of access to information, PAIA was never intended to give effect to all aspects of the right of access to information. There therefore remains, so the argument goes, a duty under s 32(2) to enact further legislation in order to give effect to further aspects of the right of access to information.[92] The applicant had argued its case in terms of s 167(4)(e) of the Constitution which permits the Constitutional Court to find that Parliament had failed to fulfil a constitutional obligation.[93] The applicant contented that, in failing to enact such further legislation Parliament had failed to fulfil its 'constitutional obligation' under s 32(2).

The majority held that, in so far as the applicant's case was that the legislation enacted to give effect to the constitutional right of access to information – PAIA – did not enable the applicant to exercise its right of access to information fully, the applicant ought to have, in compliance with constitutional subsidiarity, challenged the constitutionality of PAIA in terms of s 172 of the Constitution.[94]

The majority holding, if understood as authority for the view that a litigant wishing to exercise the right in s 32(1) of the Constitution must rely on or challenge the constitutionality of the legislation expressly enacted in terms of s 32(2) of the Constitution, is in line with the form of constitutional subsidiary discussed thus far.[95] This holding is problematic, however, if understood as authority for the view that a challenge to the constitutionality of PAIA is the correct cause of action in circumstances such as those that arose in *My Vote Counts 1*. It is problematic because of the applicability, in circumstances such as those that arose in *My Vote Counts 1*, of at least one other form of constitutional subsidiarity.

The other form of subsidiarity, detailed in the minority judgment in *My Vote Counts 1*, that is particularly relevant to this analysis, arises in circumstances where more than one right in the Bill of Rights is implicated in a factual situation.[96] In such cases, reliance must be placed on the more specific of the rights, with the

[91] *My Vote Counts 1* (note 8 above) at para 86.
[92] Ibid at para 67.
[93] Ibid at para 2.
[94] Ibid at para 192.
[95] Van der Walt *Property and Constitution* (note 78 above) at 38.
[96] *My Vote Counts 1* (note 8 above) at para 49 and Marais & Maree (note 81 above) at 27.

more general right playing what I will call a 'supportive' role.[97] The general right will assist with the determination of whether there has been a violation of the more specific right. The right to dignity often plays such a supportive role.[98] The Constitutional Court in *Nokotyana & Others v Ekurhuleni Metropolitan Municipality & Others* (*Nokotyana*) noted, with respect to the constitutional rights to housing and dignity that:

> Section 39 of the Constitution requires courts when interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. It is incontestable that access to housing and basic services is important and relates to human dignity. It remains most appropriate though to rely directly on the right of access to adequate housing, rather than on the more general right to human dignity.[99]

While there are instances where the right of access to information will be the more specific right implicated, there are in fact also many instances where that right plays a supportive role. The idea that many (if not all) fundamental human rights have a facet that involves access information is not new – in fact, South Africa's recognition of access to information as a stand-alone right is fairly unique.[100] At an international level, the right of access to information is recognised as forming part of the right to freedom of expression.[101] Access to information elements have also been recognised as features of a number of other fundamental rights.[102]

In South Africa, both the legislature and the courts have repeatedly, if not very expressly, recognised an access to information element to other fundamental rights, including the right to vote. In *President of the Republic of South Africa & Others v M & G Media Ltd*, for instance, the Constitutional Court held: 'In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined.'[103]

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[97] See *Soobramoney v Minister of Health (Kwazulu-Natal)* [1997] ZACC 17, 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC) at paras 15–16 and 19 (Constitutional Court held that, as our Constitution has a specific right to health care, the right to life cannot be relied on directly to support a health care claim. The right to life will be taken account of, as part of the broader textual context of the right to health care, when interpreting the right to health care, but cannot be relied on directly.)

[98] S Woolman 'Dignity' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2013) 20–21.

[99] [2009] ZACC 33, 2010 (4) BCLR 312 (CC) at para 50 (footnotes omitted).

[100] W Peekhaus 'South Africa's Promotion of Access to Information Act: An Analysis of Relevant Jurisprudence' (2014) 4 *Journal of Information Policy* 570 at 596–570.

[101] Universal Declaration of Human Rights (10 December 1948) UNGA Res 217 A (III) (UDHR) art 19 and International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171 (ICCPR) art 19.

[102] With respect to environmental law, see for example M Gavouneli 'Access to Environmental Information: Delimitation of a Right' (2000) 13(2) *Tulane Environmental Law Journal* 303 at 327. See also, with respect to the right to work, the UN Committee on Economic, Social and Cultural Rights' *General Comment No 18: The Right to Work (Art 6 of the Covenant)* (6 February 2006) E/C.12/GC/18 at paras 12, 28 and 42.

[103] [2011] ZACC 32, 2012 (2) SA 50 (CC), 2012 (2) BCLR 181 (CC) at para 10.

From the consideration of electoral legislation in the previous section it is clear that the legislature also recognises an information element to the right to vote. The Electoral Act, the LGMEA and the Electoral Commission Act all create access to information duties.[104] In fact, both the Electoral Act and the LGMEA create not only a number of record-creation and record-keeping duties but also some proactive release duties. One example is the duty imposed on the chief electoral officer to compile and make publicly accessible a national common voters' roll.[105] Making the roll publicly accessible makes it possible, for instance, for adult citizens to verify that their names have been recorded on the voters' role, and recorded correctly. To the extent that individuals determine, through access to the roll, that their names do not appear, they therefore have an opportunity to stake steps to register in order to be able to exercise the franchise. Similarly, should someone discover an error in the way they are recorded on the roll, they will be able to take steps to have the error corrected.[106] Ultimately, therefore, access to the voters' roll would make it possible for such individuals to exercise their right to vote. It is clear therefore that the right to vote has an access-to-information dimension to it.

In *My Vote Counts 1*, the applicant contended that South African citizens need access to information about the funding of political parties in order meaningfully to exercise their right to vote.[107] The applicant was therefore primarily seeking to protect and ensure full exercise and realisation of the right to vote, as contained in s 19(3)(a) of the Constitution. The principle of subsidiarity, in this sense, therefore required of the applicant to rely on the more specific right – the right to vote in s 19(3)(a) – not the right of access to information. The right of access to information in s 32, while not irrelevant to the enquiry, should play a supplementary role in determining whether Parliament's failure to ensure access to funding information violates the political rights in s 19.

In my view, therefore, the majority in *My Vote Counts 1* applied the principle of subsidiarity incorrectly. While they held, correctly, that the principle did apply, they used it to find that the applicant ought to have challenged PAIA.[108] That is akin to blaming the librarian, whose job it is to help you locate a book, when in fact no one has even written the book you are looking for. The proper location for duties to create and keep, and in certain instances to proactively disclose, records of information related to voting (if this information is required for the exercise and protection of the right to vote) is in the legislation enacted to give effect to the right to vote, not in PAIA.

While s 32 of the Constitution specifically requires that effect be given to the right of access to information through national legislation enacted to ensure the realisation of the right, s 19 of the Constitution contains no similar provision. This does not mean there is no duty on Parliament to ensure it enacts legislation that gives effect to the political rights in s 19 of the Constitution. Section 7(2)

[104] See in relation to the Electoral Commission Act (note 69 above).
[105] Electoral Act ss 5 and 16.
[106] Electoral Act ss 6, 9 and 15(1)(c).
[107] *My Vote Counts 1* (note 8 above) at paras 2 and 127. See also Du Plessis (note 90 above) at para 9.
[108] *My Vote Counts 1* (note 8 above) at para 193.

of the Constitution enjoins the state to 'respect, protect, promote and fulfil the rights in the Bill of Rights'. In so far as legislation is required therefore, in order to ensure protection, promotion and fulfilment of the right to vote, as contained in s 19 of the Constitution, the legislature, as a part of the state, is required to enact such legislation.

The minority, in finding that this aspect of subsidiarity (relying on or challenging effect-giving legislation, rather than directly on the right) did not apply was, in my view, correct. However, in holding that subsidiarity does not apply at all, the minority erred. Subsidiarity should have been applied but in a different way.[109] The principle of subsidiarity, properly applied, required – to borrow from the language of the *Nokotyana* court – reliance 'directly on the right [to vote], rather than on the more general right [of access to information]'.[110] The Court ought to have determined whether the information MVC was seeking to access is in fact required in order to ensure protection and full realisation of the right to vote (an enquiry the minority did in fact engage with). Parliament has a duty, in terms of s 19(3) read with s 7(2) of the Constitution to respect, protect, promote and fulfil the right to vote. Should the court have determined that the information MVC was seeking to access is required to ensure full realisation of the right to vote, it ought to have ordered Parliament to amend the electoral legislation, to reflect therein a duty to record this information. Should there be a clear public interest in making the information accessible automatically, without the need for any access-to-information requests, the proper location for such a duty of proactive disclosure would similarly be in the electoral legislation and not in PAIA.

Cachalia argues the majority simply mischaracterised the applicant's argument.[111] The applicant had argued its case in terms of s 167(4)(e) of the Constitution. The applicant's argument was that s 32(1) of the Constitution would envision more than PAIA makes provision for, that Parliament therefore ought to enact, in order to fulfil its obligation in s 32(2) of the Constitution, other legislation as well – to supplement PAIA.[112] Cachalia contends that if understood as a constitutional challenge in terms of s 167(4)(e) – challenging sufficiency of the legislation Parliament has enacted rather than the constitutional validity thereof – subsidiarity is not applicable.[113] I respectfully disagree.

As already noted above, one aspect of the principle of subsidiarity, the aspect relied on by the majority in *My Vote Counts 1*, compels litigants to rely on legislation enacted by Parliament in order to give effect to a right, or to challenge it through direct reliance on the constitutional right. In relation to the right of access to information, Parliament has enacted legislation to give effect and meaning to the right: PAIA. With PAIA, Parliament chose to provide a mechanism for accessing existing records. At a legislative level this means that PAIA necessarily intersects with other effect-giving legislation (that is legislation giving effect to other rights

[109] Ibid at para 68.

[110] *Nokotyana* (note 99 above) at para 50.

[111] R Cachalia 'Botching Procedure, Avoiding Substance: A Critique of the Majority Judgment in *My Vote Counts*' (2017) 33 *South African Journal on Human Rights* 138 at 141.

[112] *My Vote Counts 1* (note 8 above) at paras 19 and 21.

[113] Cachalia (note 111 above) at 147–149.

and public interest issues) which contains record-creation and record-keeping duties – such as the Electoral Act. Crucially, these laws were not enacted to give effect to the right of access to information directly, but to give effect to other sector-specific rights and public interest goals. This means that at a normative level too, there is an intersection between the right of access to information and other human rights. This ties in with the second aspect of subsidiarity: which right is primary in this instance?

The applicant's argument that s 32 of the Constitution directly required the enactment of sector-specific legislation that would necessitate the recording, keeping and proactive disclosure of information, about private funding of political parties, boils down to an argument that Parliament's choice in giving effect to the right of access to information only as a mechanism for access, is constitutionally incorrect. In this sense the majority was correct in holding that if the applicant's argument was that PAIA did not do all the work s 32 of the Constitution required of it, it should have challenged the constitutionality of PAIA. It was therefore correct to say that a challenge, framed in this way, should have been brought in terms of s 172, not s 167(4)(e).

What Cachalia misses is that the legislative scheme must be evaluated as a whole. The model Parliament chose involves the record-creation, record-keeping and proactive disclosure duties being located within sector-specific legislation related to other rights or public interest issues in relation to which information is required in order to fully enjoy or protect those rights or interests. She ignores that these duties arise from these other rights or interests as an informational aspect of those rights or interests and sector-specific legislation – including electoral legislation – makes provision for record-keeping, record-creation and proactive disclosure duties.

Both Cachalia, and the minority in *My Vote Counts 1*, make the mistake of classifying this sector-specific legislation as legislation enacted to give effect *to the right of access to information in s 32*.[114] These pieces of legislation were, however, not enacted to give effect to s 32. A quick look at the Preamble or purpose provision of any number of these pieces of legislation will tell you they were enacted to give effect to other rights and public purposes. Does this mean that s 32 played no role? No, but it does mean, in line with the principle of subsidiarity – as developed by our courts – that it played a supportive role in the interpretation of the more primary rights and interests which were the subject of the sector-specific legislation. It played a role in recognising the need for access to certain kinds of information in order to ensure full enjoyment or protection of the relevant right or interest. If the Constitutional Court were to have given the order Cachalia argues they should have, they would in effect have ignored the legislative choices made by Parliament;[115] a violation of the separation of powers doctrine.

Of course, there is an alternative. Another aspect of subsidiarity also applies to the facts of *My Vote Counts 1*. This aspect of subsidiarity requires of litigants

[114] Ibid at 144 and *My Vote Counts 1* (note 8 above) at para 67.
[115] Cachalia (note 111 above) at 141.

to rely, in instances where more than one right is affected, on the right more directly applicable. It is in fact, as will be demonstrated below, the information aspect of the right to vote (s 19(3) of the Constitution) as informed by (or interpreted in light of) the right of access to information (s 32 of the Constitution) that requires that information about the private funding of political parties be publicly accessible. Therefore there has been a legislative failing, but Parliament's failure to enact such a provision within existing or new sector-specific (political) legislation is a failure to give full effect to the rights in s 19 of the Constitution, rather than a failure under s 32 of the Constitution. Making a claim for access to this information based in s 19 means that the argument for access is still made, but made in a manner that does not challenge, but rather operates within, the legislative scheme for access to information chosen by Parliament when it enacted PAIA. In other words, it would make it possible for the applicant to make its case without challenging the constitutionality of PAIA. To the extent that there may be a constitutional argument that the legislative scheme for access to information, chosen by Parliament when it enacted PAIA, does not give full effect to the right in s 32 of the Constitution, I agree with the majority that such a case would necessarily involve a constitutional challenge to the validity of PAIA on the basis of the fact that, and to the extent that, PAIA does not give full effect to the right.

B The Scope and Content of the Right to Vote

Given the argument thus far, I now turn to determine whether the right to vote should be understood to impose a duty to provide access to information about the private funding of political parties. It thus becomes necessary to consider the scope and content of the right to vote. The right to vote is contained in s 19(3)(a) of the Constitution, which provides: 'Every adult citizen has the right to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret'.

1 *Interpretive Approach*

Section 39(1)(a) of the Constitution, provides that '[w]hen interpreting the Bill of Rights, a court … *must promote the values* that underlie an open and democratic society based on human dignity, equality and freedom' (emphasis added). Section 39(1)(a) therefore requires that whenever content is given to rights in the Bill of Rights, effect must be given to the purpose of that right – that is to say, a 'purposive' approach must be taken to the interpretation of rights in the Bill of Rights. In the South African constitutional law context a reference to the 'purpose' of a right is a reference to purpose in a teleological sense, that is, to the more objective aim of a provision rather than to the intention of the legislature at the time of enactment.[116] The purpose of a right is therefore determined with reference to the underlying values noted in s 39(1)(a) and with reference to the historic and textual context in which that right is located.[117]

[116] J Landis 'A Note on "Statutory Interpretation"' (1930) 43 *Harvard Law Review* 886 at 888 and A Barak *Purposive Interpretation in Law* (2005) 171–173.

[117] I Currie & J De Waal *The Bill of Rights Handbook* (6 ed, 2013) 136–137 and 141.

In so far as the role of text goes, the Constitutional Court in *S v Makwanyane* made it clear that, when interpreting rights in the Bill of Rights, while due regard must be paid to the words of the text, should the text allow for more than one interpretation of a provision, the interpretation that needs to be favoured is the more generous interpretation that best gives expression to the underlying values of the Constitution.[118] Generous interpretation has in turn been described as 'drawing the boundaries of rights as widely as the language … and the context … makes possible'.[119] Rights in the Bill of Rights should therefore be interpreted generously and purposively; taking into consideration the underlying values and historical and textual context. A purposive approach to the interpretation of the right to vote therefore requires an understanding of the purpose of the right to vote.

Section 39(1)(b) of the Constitution further requires a consideration, in the interpretation of a right in the Bill of Rights, of applicable international law, while s 39(1)(c) allows for the consideration of comparative foreign law.

Therefore, in considering whether the right to vote, in s 19(3)(a), should be understood to impose a duty to provide access to information about the private funding of political parties it is necessary to take account of a number of things. Account needs to be taken of the international law position and, as both the Constitutional Court and Parliament have given some content to the right to vote, also to the content these branches of government have given this right. I will in particular, in what follows, highlight the Constitutional Court's findings with respect to the purpose of the right to vote. In light of similar constitutional protections, and as disclosure laws have for many years formed part of a more extensive campaign finance regulatory regimen in the US, I will also consider the case law of the US Supreme Court related to disclosure and campaign finance.

2 *International Law*

Section 39(1)(b) makes it necessary to consider the content given to the right to vote in international law instruments to which South Africa is a signatory.

The right to vote is recognised in art 21 of the Universal Declaration of Human Rights (UDHR) and given legal effect in art 25 of the International Covenant on Civil and Political Rights (ICCPR). The UDHR provides for political participation 'directly or indirectly through chosen representatives' and for the expression of the will of the people through 'periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.'[120] The ICCPR, in very similar terms, provides for political participation as well as for a right to vote and to stand for public office.[121] With respect to the right to vote, and to stand for public office, art 25(b) of the ICCPR provides for citizens' right '[t]o vote and to be elected at genuine periodic elections

[118] [1995] ZACC 3, 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 9.
[119] Currie & De Waal (note 117 above) at 138.
[120] UDHR arts 21(1) and (3).
[121] ICCPR arts 25(a) and (b).

which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors'.

Section 19(3)(a) of the South African Constitution, by comparison, only provides for a right to vote in secret. However, the Constitutional Court has held that this right, to vote, is necessarily a right to vote in 'free and fair' elections.[122] The Court has also held that the founding values of the Constitution, which include commitments to equality and universal adult suffrage, should inform the interpretation of the right to vote.[123] The provisions with respect to the right to vote in the ICCPR and in the South African Constitution, therefore, have fairly similar content.

At a regional level the African Charter on Human and Peoples' Rights[124] (the African Charter) provides more indirectly for a citizen's 'right to participate freely in the government of his country, either directly *or through freely chosen representatives* in accordance with the provisions of the law'.[125]

Guidance is provided by the United Nations Committee on Human Rights (UNCHR) in its *General Comment 25*[126] on what art 25 of the ICCPR entails. With respect to the right to vote, the Comment notes that the right must be 'guaranteed by law' only allowing for 'reasonable restrictions'.[127] The note specifically records that any distinction between citizens, within the national legislation of state parties, if based on grounds of 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status' is prohibited.[128] Distinctions between the voting rights of citizens-by-birth and naturalised citizens may also be in conflict with art 25 of the ICCPR.[129] *General Comment 25* further provides that where limitations are placed on art 25 rights, they have to be 'objective and reasonable' in order to be lawful.[130]

More significantly, the Comment provides that where participation by citizens is indirect – that is, through representatives – the electoral process needs to facilitate accountability.[131] To ensure accountability, elections need to be 'genuine' and held at intervals, regular enough to ensure 'the authority of government continues to be based on the free expression of the will of electors'.[132]

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[122] *New National Party v Government of the Republic of South Africa & Others* [1999] ZACC 5, 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC)('*New National Party*') at para 12.

[123] *African Christian Democratic Party v Electoral Commission & Others* [2006] ZACC 1, 2006 (3) SA 305 (CC), 2006 (5) BCLR 579 (CC)('*ACDP*') at para 21. See also T Roux 'Democracy' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS5, 2013) ch10p25.

[124] (1982) 21 ILM 58 (adopted 27 June 1981, entered into force 21 October 1986).

[125] African Charter art 13 (emphasis added).

[126] UN Human Rights Committee *CCPR General Comment No 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service* CCPR/C/21/Rev.1 (12 July 1996)('*General Comment 25*').

[127] Ibid at paras 9–10.

[128] Ibid at para 3.

[129] Ibid at para 3.

[130] Ibid at para 4.

[131] Ibid at para 7.

[132] Ibid at para 9.

The right to vote also imposes a duty on states to 'take effective measures to ensure that all persons entitled to vote are able to exercise that right'.[133] These include measures aimed at enabling voting and measures aimed at limiting constraints on capacity and propensity. Enabling measures include, for instance, 'registration campaigns' and measures aimed at addressing impediments related to literacy, language, poverty and limitations on movement.[134] Measures related to limiting constraints on capacity and propensity include a prohibition on the effective exclusion of homeless persons from the franchise, and a requirement that intimidation and coercion be criminalised.[135] The Comment highlights the interconnectedness of the rights to vote and to stand for election. It takes note of the fact that limitations on the ability to stand for election indirectly impacts on the right to vote as it limits voters' choice.[136] The right in art 25(b) encompasses a right to independent supervision of elections and a right to measures that will ensure the integrity of vote counting.[137] It requires that a state's chosen electoral scheme ensures that 'the free will of the electors' is carried out, which in turn requires that equal weight be assigned to all votes.[138] This is a right to an 'effective', 'secret' vote in free and fair elections.[139]

In response to an identified need for some criteria for the measurement of what would constitute 'free and fair elections', the Organization for Security and Co-operation in Europe (the OSCE) issued a draft guide to international standards on democratic elections.[140] The guide outlines international best-practice examples, based on decisions by institutions of the European Union (EU).[141] South Africa is not a member of the OSCE or of the European Union and is not signatory to, nor bound by, the European Convention on Human Rights (ECHR) – the instrument primarily interpreted by the institutions of the EU.[142] Moreover the South African Constitutional Court has made it clear that it would be improper to try to formulate a once-and-for-all test for what constitutes free and fair elections in South Africa.[143] Nevertheless, the South African courts are still required to give some content – even if they will not formulate a once-and-for-all test – to the right to vote and to determine what specific rights and

[133] Ibid at para 11.
[134] Ibid at paras 11–12.
[135] Ibid at para 11.
[136] Ibid at para 15.
[137] Ibid at para 20.
[138] Ibid at paras 21–22. See also G Goodwin-Gill *Codes of Conduct for Elections: A Study Prepared for the Inter-Parliamentary Union* (1998) 115, available at archive.ipu.org/PDF/publications/CODES_E.pdf (accessed on 14 June 2018).
[139] *General Comment 25* (note 126 above) at paras 19–20.
[140] Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights *International Standards and Commitments on the Right to Democratic Elections: A Practical Guide to Democratic Elections Best Practice* OSCE/ODIHR (2002) ('*OSCE Report*'), available at http://www.osce.org/odihr/elections/16859?download=true (accessed on 4 August 2016).
[141] Ibid at 1–2.
[142] The OSCE has 57 member states from across Europe, Central Asia and North America. South Africa is not a member.
[143] *Kham & Others v Electoral Commission & Another* [2015] ZACC 37, 2016 (2) SA 338 (CC), 2016 (2) BCLR 157 (CC) at para 91.

duties do in fact arise from the right.[144] A consideration of international best practice examples outlined by the OSCE is useful for an understanding of what might be included within the scope of South Africa's own right to vote. I will, however, limit this consideration to the narrow feature of the right to vote relating to disclosure of funding information.

The OSCE guide notes that, as has been the case in South Africa, the jurisprudence of the European Court of Human Rights (ECtHR) on political rights, has largely been limited to a consideration of the casting of the ballot, and has not given much consideration to the information rights attaching to the right to vote.[145] The report suggests however that 'funding disclosure' requirements are a legitimate limitation on electoral campaigning, which may even attract penalties in the form of the imposition of a fine upon failure to comply.[146] Reference in the report to 'disclosure' includes disclosure about various aspects of funding and spending, such as amounts of contributions, the nature of contributions and donor and/or recipient identities.[147] In this respect the OSCE notes, as does *General Comment 25*,[148] that some limitation on electoral campaigning is acceptable.[149] The OSCE recommends that disclosure is desirable to further the international law right to universal suffrage (an aspect of art 25 of the ICCPR).[150]

That political parties play an important role in modern democracy, is recognised in South Africa and the world over.[151] Increasingly, however, there is distrust of political parties, for a variety of reasons that includes both actual and perceived involvement in corruption.[152] A recent report notes that when campaign finance is not properly regulated, both private business and organised crime take advantage.[153] The report was issued in 2016 by International IDEA and the Netherlands Institute of International Relations (Clingendael Institute) and is based on the results of a number of research projects undertaken by both these organisations. Given South Africa's duties to protect its citizens from corruption and given the influence, internationally, of corruption on elections it is necessary also to consider, very briefly, South Africa's international commitments related to fighting corruption in so far as they relate to the right to vote.[154]

Two international treaties, signed and ratified by South Africa, contain provisions that are relevant to this discussion. In art 9 of the African Union Convention on Preventing and Combating Corruption (AU Corruption Convention) and art 4(1)(d) of the SADC Protocol against Corruption (SADC

[144] Constitution s 39(1) read with ss 7 and 8. See also S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762 at 794, 765 and 789.

[145] *OSCE Report* (note 140 above) at 13.

[146] Ibid at 16 and 24.

[147] Ibid at 24.

[148] *General Comment 25* (note 126 above).

[149] *OSCE Report* (note 140 above) at 24 and *General Comment 25* (note 126 above) at para 19.

[150] *OSCE Report* (note 140 above) at 33.

[151] I Briscoe & D Goff *Protecting Politics: Deterring the Influence of Organized Crime on Political Parties* (2016) at 7 and 11.

[152] Ibid at 11.

[153] Ibid at 20.

[154] *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6, 2011 (3) SA 347 (CC), 2011 (7) BCLR 651 (CC) at para 177.

Corruption Convention) state parties commit themselves to putting mechanisms in place that will ensure that there is access to information that will assist in the fight against corruption. Article 11(1) of the AU Corruption Convention commits state parties to extending the fight against corruption into the private sector. Therefore, even if political parties could be regarded as entirely private – which they are not – there remains a duty, to ensure access to information held by such parties, at least where that information is required to combat corruption.

In terms of art 12(2)(3) of the AU Corruption Convention, civil society and the media should be enabled to play a monitoring role with respect to transparency and accountability in the management of public affairs, and in the implementation of the convention. Article 4(1)(i) of the SADC Corruption Convention, in a similar vein, requires state parties to ensure that mechanisms exist that will 'encourage participation by the media, civil society and non-governmental organizations in efforts' aimed at preventing corruption.

But most specifically, art 10(b) of the AU Corruption Convention commits states to 'incorporat[ing] the principle of transparency into funding of political parties'. Udombana expressly links this provision about transparency in the funding of political parties back to the right to vote.[155] He suggests that good governance and the eradication of corruption stand in a 'symmetrical relationship' with one another, with each one being a necessary prerequisite for the other.[156] Given the central role good governance plays in the combating of corruption, Udombana suggests that it is not only proper but 'makes inordinately good sense' that anti-corruption legislation would require transparency with respect to the funding of political parties.[157] He notes the important role that political rights play in ensuring good governance and the consequent need to ensure that the public has access to certain kinds of information.[158]

3 *At a Comparative Level: Campaign Finance Regulation in the US*

Section 39(1)(c) of the Constitution does not mandate consideration of foreign law, as s 39(1)(b) does in relation to international law, but it does allow for it to be considered. A brief overview of the situation, in relation to disclosure about campaign finance elsewhere, could also add to our understanding of how the right to vote should be interpreted locally. In the US, as in South Africa, constitutional protection is extended to the right to vote, the right to freedom of expression, and associational rights.[159] In light of these similar constitutional protections, and as disclosure laws have for many years formed part of a more extensive campaign finance regulatory regimen in the US, I will briefly consider the case law of the US Supreme Court, related to disclosure and campaign finance.

[155] N Udombana 'Fighting Corruption Seriously? Africa's Anti-corruption Convention' (2003) *Singapore Journal of International and Comparative Law* 447 at 482–483.

[156] Ibid at 481.

[157] Ibid at 482.

[158] Ibid at 482–483.

[159] See United States Constitution the Fifteenth and First Amendments, and the Constitution ss 19, 16 and 18.

Forms of regulation used over the years in the US include not only disclosure requirements but also limitations on amounts that can be donated and amounts that can be spent in support of political parties and candidates. Some of these campaign finance regulations were famously challenged in the matter of *Buckley v Valeo*.[160] The *Buckley v Valeo* court considered and made findings on the constitutionality of legislative provisions that placed limitations on the amount of money that can be given to political parties and candidates, as well as provisions that limited the amount of money that can be spent in support of such parties or candidates.[161] I will only consider the court's findings with respect to the constitutionality of disclosure of information about persons that fund, or who incur expenses in support of, political parties or candidates.

The *Buckley v Valeo* court held that the impugned disclosure requirements were not unconstitutional under the US Constitution. It held that there were three important interests justifying the infringement of rights caused by disclosure.[162] One of the three interests recognised by the court was the electorate's interest in being informed about where money in the political arena comes from and how it is being spent.[163]

The court recognised that information about where political funding comes from and how it gets spent makes it possible for 'voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches'.[164] The Supreme Court therefore recognised that voters have an interest in information about who provides funding to political parties and candidates. The court found that this information is important to voters because it makes it possible for them to understand better what the various political candidates (and parties) truly stand for and which interests they will support if elected into office.[165] Disclosure for this purpose, alongside the purpose of combating actual and perceived corruption and the purpose of ensuring compliance with contribution limitations (that in turn also serve to curb corruption and the perception of corruption), was found to justify infringement of the right of 'privacy of association and belief'.[166] Of these three interests, Briffault notes that the informational interest has, over time, proven to be the most compelling justification for disclosure requirements in the electoral context.[167]

The *Buckley v Valeo* court did note, however, that where contributions are made to minor parties, the government interest in disclosure is less significant, as minor parties 'usually represent definite and publicized viewpoints'.[168] The court also noted that if disclosure leads to reprisal and that reprisal, or the threat

[160] 424 US 1 (1976).
[161] Ibid at 21–23, 27–29, 44–45, 47–49, 51, 64, 66–67 and 70–72.
[162] Ibid at 66.
[163] Ibid.
[164] Ibid at para 67.
[165] Ibid.
[166] Ibid at 64, 66–67 and 72.
[167] R Briffault 'Two Challenges for Campaign Finance Disclosure after *Citizens United* and *Doe v Reed*' (2011) 19 *William & Mary Bill of Rights Journal* 983 at 990.
[168] *Buckley* (note 160 above) at 70.

of reprisal, in turn leads to a decrease in contributions, the harm to minor parties might be greater than for the major parties as minor parties are less likely to be financially robust.[169] The court therefore found that there may be situations in which the application of disclosure requirements to funders of a specific political party, candidate or cause would be unconstitutional and that exemption from disclosure would be appropriate in those circumstances.[170] The court noted however that an exemption would only be granted if evidence is provided showing that there is a 'reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties'.[171]

More recently the Supreme Court again considered disclosure requirements in *McConnell v Federal Election Commission*[172] ('*McConnell*'), *Citizens United v Federal Election Commission*[173] ('*Citizens United*') and *John Doe No 1 v Reed*[174] ('*Doe v Reed*'). In *McConnell* the Supreme Court considered the constitutionality of new legislative provisions that had similar disclosure requirements to those considered in *Buckley v Valeo*. The *McConnell* court found that the same three interests that the *Buckley v Valeo* court had found justified the disclosure of information about funders applied with respect to the new legislation.[175] The court therefore confirmed that litigants wishing to escape the disclosure requirements of the new legislation would have to apply for an exception based on the fact that special circumstances existed, in which the application of the disclosure requirements would be unconstitutional.[176] On the specific facts of the *McConnell* matter, the court found that the litigants had not established that there was a probability of the harm identified in *Buckley v Valeo* and so were not entitled to an exception from the disclosure requirements.[177] The court also noted that disclosure requirements do not actually prevent speech but do serve the important function of ensuring the public is aware, when they go the polls, who the supporters are of the various parties and candidates.[178]

In *Citizens United* the challenge related to legislative requirements in terms of which the non-profit corporation 'Citizens United' was required to disclose certain information in a motion picture film (movie) it had produced, as well as in advertising for the movie.[179] The movie was aimed at encouraging voters not to vote for then-senator Hillary Clinton in the 2008 presidential elections.[180] The impugned legislation required Citizens United to disclose in the movie, and

[169] Ibid at 71.
[170] Ibid.
[171] Ibid at 71–74.
[172] 540 US 93, 124 SCt 619 (2003).
[173] 558 US 310, 130 SCt 876 (2010).
[174] 561 US 186, 130 SCt 2811 (2010).
[175] *McConnell* (note 172 above) at 196.
[176] Ibid at 197–199.
[177] Ibid at 199.
[178] Ibid at 201.
[179] *Citizens United* (note 173 above) at 914.
[180] Ibid at 890.

the advertising for the movie, that it was responsible for the content of those productions.[181]

The *Citizens United* court noted that the disclosure requirements served the important function of ensuring that voters were made aware of 'who is speaking'.[182] The court noted that it had confirmed the constitutionality of the disclosure provisions of the relevant legislation in *McConnell* and that it would therefore 'adhere to [the *McConnell*] decision as it pertains to the disclosure provisions [of the legislation]'.[183] The court also found that 'disclosure is a less restrictive alternative to more comprehensive regulations of speech'.[184] The court in fact found that voters' interest in the information was on its own adequate justification for the application of the disclosure provisions to advertisements such as those before the court.[185] The court also found – as it had in *Buckley* and *McConnell* – that Citizens United had failed, on the specific facts before the court, to tender evidence of probability of harm. Citizens United was therefore not entitled to an exception from the disclosure requirements.[186] The court noted that:

> With the advent of the Internet, prompt *disclosure of expenditures can provide* shareholders and *citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters*. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and *citizens can see whether elected officials are "'in the pocket" of so-called moneyed interests*.' The First Amendment protects political speech – and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.[187]

In *Doe v Reed* the constitutionality of certain legislation, that allowed access to information (including names and addresses) about persons that had signed petitions calling for referendums on legislation enacted by the legislature, was challenged.[188] Over and above the general challenge to the disclosure provisions, the plaintiffs also sought to argue that, on the facts of their specific matter, they should be granted an exemption from the provisions of the impugned legislation. On the facts of their matter, if they were not allowed an exemption, access could be granted to information about the signatories to a petition that called for a referendum on legislation that extended the rights and responsibilities of registered 'domestic partners, including same-sex partners'.[189] The Plaintiffs contended that in this specific case there was a reasonable probability that the signatories to that petition would suffer the harms highlighted by *Buckley v Valeo*; threats, harassment and reprisals.[190]

[181] Ibid at 914.
[182] Ibid at 915.
[183] Ibid.
[184] Ibid.
[185] Ibid at 915–916.
[186] Ibid at 916.
[187] Ibid (own emphasis, internal references omitted).
[188] *Doe v Reed* (note 174 above) at 2815.
[189] Ibid at 2816–2817.
[190] Ibid at 2817.

The court confirmed that signing a petition for a referendum was a form of expression.[191] The court also, again, confirmed its previous holdings that a disclosure requirement does not act as a bar to speech and that, in the electoral context, disclosure requirements would be constitutional if there is a substantial relation between the disclosure requirement and a sufficiently important government interest.[192] The court found disclosure of information about persons that sign petitions for referendums serves the important dual purpose of preserving the integrity of, and ensuring transparency and accountability in, the electoral process. Finding that this is a sufficiently important government interest and that it is related substantially to disclosure requirements, the court held that the disclosure requirements were constitutional.[193]

While the Supreme Court in *Buckley v Valeo*, *McConnell* and *Citizens United* expressly recognised the informational interest in information about funding in politics, in *Doe v Reed* the court found it unnecessary to consider the informational interest justification. It had been able to make a finding just on the dual purpose of preserving the integrity of, and ensuring transparency and accountability in, the electoral process.[194]

Briffault, however, suggests that the court's finding on transparency and accountability in the electoral process actually supports the informational interest justification.[195] Citizens that have access to information of this kind are able to monitor the electoral process and to ensure participants in the process are held to account, they therefore have an informational interest precisely because of the interest in transparency and accountability in the electoral process.

The court found that the plaintiffs failed to provide evidence that disclosure of information about persons that sign petitions for referendums will generally lead to the harms contemplated in *Buckley v Valeo*,[196] but left it to a lower court to determine whether in this specific instance there was a reasonable probability that the signatories to the petition for a referendum on the legislation extending more rights to same-sex partners could experience those harms.[197]

4 *The Meaning of the Right to Vote in s 19 of the Constitution*

Both the South African courts and the legislature have contributed to the delineation of the scope and content of the constitutional right to vote. In what follows, I try to take account of how these two arms of government have given content to the right.

[191] Ibid at 2817–2818.
[192] Ibid at 2818–2820.
[193] Ibid at 2819.
[194] Ibid.
[195] Briffault (note 167 above) at 997.
[196] *Doe v Reed* (note 174 above) at 2821.
[197] Ibid at 2815 and 2821.

aa Purpose of the Right to Vote

In the following, often quoted passage out of *August v Electoral Commission* (*August*), Justice Sachs laid out the purpose of the right to vote:

> Universal adult suffrage on a common voters roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. *The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are*, whether rich or poor, exalted or disgraced, *we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity.*[198]

The history (and continued legacy) of disenfranchisement and inequality in South Africa – and the indignity that that entailed – therefore plays a key role in the underlying purpose, in South Africa, for the right to vote.[199] The purpose is also clearly linked to the foundational values of South African democracy, laid out in s 1(d) of the Constitution: '[U]niversal adult suffrage, a national common voters roll, regular elections and a multiparty system of democratic government, to ensure accountability, responsiveness and openness.' The Court in *AParty v Minister for Home Affairs* (*AParty*) held that the political rights in s 19 aim to give effect to these values.[200]

bb Free and Fair Elections

The Constitutional Court has determined that the right to vote attaches to every South African adult citizen.[201] It is a right to vote in free and fair elections.[202] Section 19(2) of the Constitution, providing for 'free and fair elections', therefore helps give content and meaning to the right to vote in s 19(3)(a). As the Constitutional Court held in *New National Party v Government of the Republic of South Africa* 'the requirement that every election should be free and fair has implications for the way in which the right to vote can be given more substantive content and legitimately exercised.'[203]

The Constitutional Court has noted that there is no internationally-accepted definition for the term 'free and fair elections' and has itself declined to develop a test to determine whether elections have in fact been 'free and fair' – holding that it would be 'undesirable' to do so.[204] The Court has, however, found that the achievement of 'free and fair elections' will necessarily involve the regulation

[198] *August & Another v Electoral Commission & Others* [1999] ZACC 3, 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) at para 17 (emphasis added).

[199] See also *Ramakatsa & Others v Magashule & Others* [2012] ZACC 31, 2013 (2) BCLR 202 (CC) at para 64.

[200] [2009] ZACC 4, 2009 (3) SA 649 (CC), 2009 (6) BCLR 611 (CC) at para 5.

[201] *Democratic Alliance v African National Congress & Another* [2015] ZACC 1, 2015 (2) SA 232 (CC), 2015 (3) BCLR 298 (CC)('*DA v ANC*') at para 42.

[202] *New National Party* (note 122 above) at para 12.

[203] Ibid.

[204] *Kham* (note 143 above) at paras 34 and 91.

of elections through national legislation that is compliant with the provisions of the Constitution.[205] The court also found that, in giving effect to the right to vote, Parliament can require eligible citizens wanting to vote to take prescribed steps before they can exercise the right.[206] The outcome of any regulation of the right, however, must be that, if reasonable steps are taken by such a person, they will be able to exercise their right.[207] Along a similar vein, but in relation to political parties, Justice Skweyiya, in his dissenting judgment in *African Christian Democratic Party v Electoral Commission* (*ACDP*), highlights the fact that political parties necessarily have to 'bear their share' with respect to the constitutional commitment to free and fair elections.[208] The legislature has recognised a number of positive duties on political parties arising from the right to free and fair elections and the right to vote, including for instance, a duty to state, publicly, that political beliefs and opinions should be challenged and debated.[209]

cc Democratic Values

The courts have recognised that political rights, and, in particular, citizens' rights to free and fair elections, are fundamental to democracy.[210] The right to vote in fact has been held to be essential for the existence of democracy, at least the particular form of democracy envisioned by our Constitution.[211] In Schedule 2 to the Electoral Act, the legislature recognises as part and parcel of free and fair elections 'open public debate' – tying in with the kind of democracy our Constitution envisages: a democracy with participative elements that embraces transparency.[212]

The system of government in South Africa is a particular form of democracy: a 'representative democracy'. This means that while South African adult citizens govern themselves, so to speak, they do not ordinarily partake directly in the decision making of government; they elect officials that participate, on their behalf, in decision making.[213] A key feature of a representative democracy is accountability – meaning that elected officials are answerable to the voters that elected them to office.[214] There are various ways in which the electorate holds their elected representatives accountable, including through their future votes for (or against) representatives that have spoken for (or failed to speak

[205] *New National Party* (note 122 above) at para 14. See also *AParty* (note 200 above) at paras 6–7.

[206] *New National Party* (note 122 above) at para 21 and *AParty* (note 200 above) at para 68. See also *August* (note 199 above) at para 16.

[207] *New National Party* (note 122 above) at paras 19 and 21.

[208] *ACDP* (note 123 above) at para 48.

[209] Electoral Act Item 4(1)(a)(ii) of Schedule 2.

[210] *New National Party* (note 122 above) at para 2 and *ACDP* (note 123 above) at para 19.

[211] *New National Party* (note 122 above) at paras 11 and 122. See also *Richter v The Minister for Home Affairs & Others* [2009] ZACC 3, 2009 (3) SA 615 (CC), 2009 (5) BCLR 448 (CC) at para 53 and Roux (note 123 above) at 62–77.

[212] *Doctors for Life International v Speaker of the National Assembly & Others* [2006] ZACC 11, 2006 (12) BCLR 1399 (CC), 2006 (6) SA 416 (CC) at paras 111, 115–116 and 121.

[213] See Constitution ss 57(1)(b), 70(1)(b), 116(1)(b) and Roux (note 123 above) at 2.

[214] *General Comment 25* (note 127 above) at para 7 and D Yiğit 'Democracy in the European Union from the Perspective of Representative Democracy' (2010) *Review of International Law and Politics* 119 at 123 and 126–127. See also H Pitkin *The Concept of Representation* (1967) 56–57.

for) them in the governing of the state.[215] The Constitution does not dictate the form of democracy that South Africa should take on, but does lay down certain key features it must have. Roux notes that the Constitution uses the following four terms to describe the characteristics of the type of democracy it envisions: representative, participatory, constitutional and multiparty.[216]

'Participatory' refers to the involvement, through active engagement, of citizens in certain decisions of government – particularly through deliberation.[217] The Constitutional Court's consideration of the scope and meaning of the participatory characteristics of the South African democracy in *Doctors for Life*[218] and *Matatiele Municipality*[219] is particularly instructive.

In *Doctors for Life*, the applicant alleged that the National Council of Provinces' and provincial legislatures' failure to 'invite written submissions and conduct public hearings' prior to passing certain bills was unconstitutional, as it amounted to a failure to enable 'participation' as provided for in the Constitution.[220]

The Court considered the nature and scope of the constitutional duty to facilitate public participation. It noted that, under international law, this duty is regarded as a fundamental human right, consisting both of 'a general right to take part in the conduct of public affairs; and a more specific right to vote and/or to be elected'.[221] Crucially the court noted that this right confers on state parties, not only negative obligations not to interfere in the exercise of the right by citizens, but also certain positive duties. One of those positive obligations is to ensure that opportunities are created for the exercise of participation rights.[222]

The court held that the political rights in art 25 of the ICCPR must be understood in light of art 19 of the ICCPR. Article 19 of the ICCPR provides for a right to 'freedom of expression' which 'shall include freedom to seek, receive and impart information and ideas of all kinds'. The court found that art 25, so understood, places a positive obligation on states to take steps to ensure that information required to enable the exercise of the right to political participation is accessible.[223] The South African government therefore has a positive duty, under international law, to ensure that the South African electorate has access to the information required to ensure meaningful participation in the electoral and law-making processes. In particular the Court held:

> While the right to political participation in international law can be achieved in multiple ways, it is clear that this right does not require less of a government than provision for *meaningful exercise of choice* in some form of electoral process and public participation in the law-making process by *permitting public debate* and dialogue with elected representatives.

[215] Constitution ss 1(d), 57(1)(b), 70(1)(b), 116(1)(b) and Roux (note 123 above) at 10–11.
[216] Roux (note 123 above) at 2.
[217] Ibid at 14–16.
[218] *Doctors for Life* (note 212 above).
[219] [2006] ZACC 12, 2007 (1) BCLR 47 (CC).
[220] *Doctors for Life* (note 212 above) at paras 2 and 7.
[221] Ibid at paras 90 and 105.
[222] Ibid at paras 91–93 and 105–106.
[223] Ibid.

> In addition, this right is *supported by the right to* freedom of expression which includes the freedom to *seek, receive and impart information*.[224]

The *Doctors for Life* Court noted that democracy in South Africa 'must be understood in the context of our history'.[225] Under apartheid the majority of South Africans were denied any opportunity to participate in the law-making process and the concept of 'people's power' developed, as part of the struggle against apartheid, as an alternative to that exclusionary form of governance. This concept of people's power involved actual participation by members of the anti-apartheid movement in the governance structures of the movement. Not only was people's power seen as a preferential alternative for the governance of the anti-apartheid movement, it was also seen as a blue print for an alternative future 'participatory democracy'.[226] The Court found that the exercise of the right to vote 'would be meaningless without massive participation by the voters' and then went on to hold that 'because of its open and public character *[participation] acts as a counterweight to secret lobbying and influence peddling.* Participatory democracy *is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist*'[227] (own emphasis).

The *Doctors for Life* Court ultimately found that the National Council of Provinces was under an obligation, in terms of the participatory provisions of the Constitution, to take reasonable steps to *facilitate* participation in law making.[228] The Court's holding was limited to the participation rights of South Africans in relation to the law-making process. But its findings about participation are relevant to meaningful participation in other aspects of the electoral process. In particular, the Court's findings that there must be 'meaningful exercise of choice' within the electoral process, that information required to exercise political rights must be accessible, and that participatory democracy plays a role in counterbalancing inequality of wealth and influence, have implications for the right to vote.

In *Matatiele*, decided the day after *Doctors for Life*, the Court articulated the underlying reason for public participation even more clearly. It noted that the reason for 'permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers'.[229] This is significant for the right to vote as well, in light of the Court's findings in *Doctors for Life* regarding the counter balancing of inequality of wealth and influence. Politicians grant access to those who fund them.[230] Those who have access have the opportunity to influence law-making; where legislation that may affect them comes before Parliament they are able to make a case for a vote on that

[224] Ibid at para 106 (own emphasis).
[225] Ibid at para 112.
[226] Ibid.
[227] Ibid at para 115.
[228] Ibid at paras 129, 132 and 145–146.
[229] *Matatiele* (note 219 above) at para 97.
[230] *McConnell* (note 172 above) at 129 referring to the finding of a 1998 US Senate Committee on Governmental Affairs report on an investigation into the 1996 US federal elections.

legislation that will favour them.[231] In a country with great wealth inequality this means that many people will never have the option of choosing to fund political parties, certainly not in significant enough amounts to gain access to politicians and influence law-making decisions. Yet the South African Constitutional Court has recognised that a key aspect of the South African democracy is permitting participation in law-making, and more than that, counterbalancing inequality of wealth and influence in the electoral and law-making processes.

dd Duties for Political Parties

Before considering some of the duties that arise for political parties from the constitutional right to vote, I will first, briefly, look at how the Constitutional Court has determined political parties should be classified. This was dealt with by the Constitutional Court in *Ramakatsa v Magashule* (*Ramakatsa*).[232]

Ramakatsa turned on whether a failure by a political party to adhere to the provisions of its own constitution amounted to an infringement of the rights of members of that party to participate in the activities of a political party, protected by s 19 of the Constitution.[233] In finding that some of the failures of the political party were indeed a violation of party members' political rights, the Court made key findings regarding the nature, under the Constitution, of political parties.[234] It held that citizens' right to participate in the activities of political parties creates a duty for political parties to ensure that they act lawfully and that they comply with their own constitutions.[235] The Court noted that political parties, rather than individual candidates, generally contest elections, and political parties determine which of their candidates get elected to legislative bodies.[236] Therefore, not only do South Africans not, generally, partake directly in the decision making of the legislature, the representatives they do elect, they only elect indirectly.[237] That is why the Constitution accords special recognition to political parties as 'veritable vehicles … chosen for facilitating and entrenching democracy', when it provides for public funding of political parties.[238] The Court therefore determined that political parties are 'indispensible (sic) conduits for the enjoyment of the right given by s 19(3)(a) to vote in elections'.[239] *Ramakatsa* makes it clear that while not state organs, political parties are something more than just private entities.

Given the unique nature and important role of political parties under the Constitution, it is no surprise that both the legislature and the courts have recognised that the right to vote imposes a number of duties on political parties. The Electoral Act, the LGMEA and the Electoral Commission Act were enacted to give effect to the political rights in s 19 of the Constitution, and specifically

[231] E Garrett 'Voting with Cues' (2003) 37 *University of Richmond Law Review* 1011 at 1029.
[232] *Ramakatsa* (note 199 above).
[233] Ibid at paras 6, 9 and 10.
[234] Ibid at paras 61, 110 and 118.
[235] Ibid at para 16.
[236] Ibid at para 66.
[237] Ibid at para 68.
[238] Ibid at para 67.
[239] Ibid at para 68.

to give substantive content to the rights to free and fair elections and to vote.[240] It is therefore important, when determining the content of the right to vote, to give consideration to Parliament's determination of that content. Such an exercise does, however, require that the provisions of the relevant legislation be interpreted in light of the foundational values of the Constitution.[241] This includes the value of a multi-party system of democratic government aimed at the achievement of accountability, responsiveness and openness.[242]

On the question of whether non-state entities can be required, in terms of duties conferred on them by fundamental rights, to take some steps to ensure the realisation of those rights, it is clear that the Bill of Rights does bind them to some extent. Section 8(2) of the Constitution provides that provisions in the Bill of Rights will bind both natural and juristic (non-state) entities 'if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'. In the context of an access to information element attaching to a fundamental right, the Supreme Court of Appeal in *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance* (*VEJA*) held that, with respect to the environment, even private corporations must operate transparently.[243] It is clear therefore that the duty to act transparently, at least to some extent, extends all the way into the private sector and would definitely also include political parties – entities with a largely public role. The legislature too has made it clear that transparency and accountability are values that must be realised in both public and private spheres.[244]

Section 32(1)(b) of the Constitution is fairly progressive internationally, as far as the right of access to information goes, in that it extends the right to include a right of access to information held by non-state entities. Both in s 32 of the Constitution and in PAIA however, the right is qualified, in that it only applies where the information sought is required for the exercise or protection of another right.[245] Section 1 of PAIA defines a 'public body' as

> (a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
> (b) any other functionary or institution when—
> (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
> (ii) exercising a public power or performing a public function in terms of any legislation[246]

[240] *New National Party* (note 122 above) at paras 13 and 14, *ACDP* (note 123 above) at para 16 and *DA v ANC* (note 202 above) at paras 21 and 34. See also LGMEA s 2(a) and Electoral Act s 2(a).

[241] *ACDP* (note 123 above) at para 21. See also Roux (note 123 above) at 25.

[242] Constitution s 1(d) and *AParty* (note 200 above) at para 5.

[243] [2014] ZASCA 184, 2015 (1) SA 515 (SCA), [2015] 1 All SA 261 (SCA) at para 82.

[244] See the Preamble to PAIA which provides that PAIA was in part enacted to 'foster a culture of transparency and accountability in public and private bodies'.

[245] PAIA s 50. See also the definition for 'private body' in PAIA s 1.

[246] PAIA s 1.

While political parties clearly do not fall within part '(a)' of the definition for 'public body', they also do not easily fit within part '(b)' of the definition either.[247] However, as all juristic persons that are not 'public bodies' are 'private bodies' for the purposes of PAIA, political parties will ordinarily, for the purposes of PAIA, be 'private bodies'.[248] As political parties are private bodies for the purposes of PAIA, therefore, requests for information made in terms of PAIA to political parties must meet the threshold requirement of a need for the information requested to be *in order to exercise or protect another right*.

There is, however, one exception to this threshold requirement, contained in s 8 of PAIA. Section 8 allows for access to records held by non-state entities as if they are state or 'public' entities – that is, irrespective of the reasons for access – whenever the information relates to a public function performed by that a private body. One might well think, given the key role political parties play in the South African democracy, that this exception applies to information held by political parties. The Western Cape High Court in *Institute for Democracy in South Africa* (*IDASA*), however, held that political parties, *when fundraising*, are in fact performing a private function.[249] This, the court found, was because when raising funds political parties are exercising common law powers, not performing a public function in terms of legislation.[250]

Arguably the court erred in failing to take a more purposive approach to the determination of the nature of records about private funding received by political parties.[251] Bosch argues that funding raised by political parties can, especially in circumstances where a party is elected to positions from which they exercise power, be applied to functions that would more clearly fall within the ambit of s 8 of PAIA. Bosch suggests that funding records are therefore 'hybrid' records, and that the 'good governance' and 'open democracy' purposes of PAIA lead to a conclusion that such 'hybrid' records should be regarded as related to a public function for the purposes of s 8 of PAIA.[252]

As long as the *IDASA* decision stands, however, and unless the legislature enacts legislation that requires that records of information about private funding be made proactively available to the public, records of this nature will have to be requested in terms of PAIA. What is more, any persons interested in getting an idea of the funding landscape in the political arena would have to make a request to every political party, and would with every request have to demonstrate that

[247] The definition for 'public body' in PAIA s 1 tracks fairly closely the definition of 'organ of state' in the Constitution, as noted by Justice Cameron in *My Vote Counts 1* (note 8 above). It could be argued that there are certain functions performed by political parties that can be regarded as the performance of a public function in terms of legislation. See generally L Thornton 'The Constitutional Right to Just Administrative Action – Are Political Parties Bound?' (1999) 15 *South African Journal on Human Rights* 351.

[248] See the definition for 'private body' in PAIA s 1.

[249] *Institute for Democracy in South Africa & Others v African National Congress & Others* [2005] ZAWCHC 30, 2005 (5) SA 39 (C), [2005] 3 All SA 45 (C) at paras 51 and 52.

[250] Ibid at para 51.

[251] S Bosch '*IDASA v ANC* – An Opportunity Lost for Truly Promoting Access to Information' (2006) 123 *South African Law Journal* 615 at 618–620.

[252] Ibid at 619–622 and 624–625.

the information is required in order to exercise or protect a right (such as the right to vote).

5 *The Right to Vote and Access to Political Party Funding Information*

Drawing together the above examination of relevant international law, US case law, as well as South African case law and legislation I now provide three arguments for access to information about private funding of political parties in South Africa.

aa Combating Corruption

In line with South African case law and legislation, the right to vote in South Africa must be understood as a right to vote in 'free and fair elections'. While there is no internationally accepted or locally developed definition for the term 'free and fair elections', the concept has been recognised to have implications for how voting is regulated.[253]

The right must also be understood in a manner that enhances democracy and the values – particularly the values of accountability, responsiveness and openness – that underpin South African democracy.[254] South Africa experiences particularly high levels of corruption,[255] something that, rather than enhancing democracy in South Africa, undermines it.[256]

International research shows that both the private business sector and organised criminals use gaps in the regulation of political party funding to exert influence.[257] It is not surprising therefore that the AU Corruption Convention commits state parties, including South Africa who has signed and ratified the convention,[258] to 'incorporat[ing] the principle of transparency into funding of political parties'.[259]

Transparency with respect to the funding of political parties will expose corruption by ensuring that the public becomes aware of any 'post-election special favours'.[260] More than that, the knowledge that information about funding will become public should in fact (to some extent) deter corruption, as knowledge of potential exposure is likely to deter engagement in corrupt practices.[261]

The general public is, however unlikely to be inclined to trawl through masses of funding data, and not all members of the public will have the skills

[253] *New National Party* (note 122 above) at para 14. See also *AParty* (note 200 above) at paras 6 and 7.
[254] See also Constitution ss 1 and 39.
[255] Transparency International ranks South Africa as the 61st most corrupt country out of 167 and gives it a score of 44 out of 100 – scores below 50 are regarded as indicating high levels of corruption. Transparency International *Corruption Perceptions Index 2015* (2015), available at http://www.transparency.org/cpi2015 (accessed on 18 November 2016).
[256] *Glenister* (note 154 above) at paras 57 and 166.
[257] Briscoe & Goff (note 151 above) at 20 and 75.
[258] Ratified on 11 November 2005.
[259] AU Corruption Convention art 10(b).
[260] *Buckley* (note 160 above) at paras 66–67.
[261] R Hasen 'Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age' (2012) 27 *Journal of Law & Politics* 557, 568–569 and 572.

and expertise to make sense of the data.[262] Civil society and the media play an important role in this respect, looking through the data for connections that would interest the general public, bringing attention to those connections and exposing corruption.[263] That civil society and the media in South Africa do in fact play a key role in the protection of fundamental rights, has been recognised by the Supreme Court of Appeal in *VEJA*.[264]

For South Africa to be able to honour its international commitment to enabling the participation of civil society and the media in the fight against corruption, South Africa will necessarily need to ensure that these groups have access to information about the private funding of political parties.[265] The disclosure of this information will make it easier for the media and civil society (and even committed members of the general public) to identify instances of private funding leading to undue influence over decision making by politicians.

Media reports about improper influence that a wealthy family, the Gupta family, appears to have over South African politics recently led to an investigation into these allegations by the Public Protector,[266] one of six bodies established by Chapter 9 of the Constitution, to support and strengthen South Africa's constitutional democracy.[267] The Public Protector is mandated by the Constitution to investigate, report on and take remedial action in response to 'conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice'.[268] The Public Protector's report makes no concrete findings of any violations of ethics codes or anti-corruption laws, citing a lack of funding and a resultant inability to properly investigate the allegations as the reason.[269] The report does, however, make several findings of fact that strongly suggest potential violations and orders remedial action in the form of further investigation.[270] Some of the more significant findings in the report include evidence placing Minister Des van Rooyen, alleged to have been appointed Minister of Finance on the say-so of the Gupta family, in the vicinity of the Gupta family home several times prior to the appointment, including on the day of the appointment.[271] While a lack of disclosure laws in South Africa makes it difficult to draw a link between

[262] L Mayer 'Disclosures about Disclosure' (2010) 44 *Indiana Law Review* 255 at 261.

[263] Udombana (note 155 above) at 484 and 486; Garrett (note 231 above) at 1025, 1031 and 1045; Hasen (note 261 above) at 567–569; and C Griffis 'Ending a Peculiar Evil: The Constitution, Campaign Finance Reform, and the Need for a Change in Focus after *Citizens United v. FEC*' (2011) 44 *John Marshall Law Review* 773 at 798.

[264] *VEJA* (note 243 above) at paras 71, 80 and 82.

[265] Davis (note 2 above) at 4.

[266] Public Protector *State of Capture: Report on an Investigation into Alleged Improper and Unethical Conduct by the President and other State Functionaries relating to Alleged Improper Relationships and Involvement of the Gupta Family in the Removal and Appointment of Ministers and Directors of the State-Owned Enterprises Resulting in Improper and Possibly Corrupt Award of State Contracts and Benefits to the Gupta Family's Businesses* Report No 6 of 2016/17 (2016) 5, available at http://www.pprotect.org/sites/default/files/legislation_report/State_Capture_14October2016.pdf (accessed on 2 July 2018).

[267] Constitution s 181.

[268] Constitution s 182.

[269] Public Protector (note 266 above) at 24.

[270] Ibid at 24–26.

[271] Ibid at 14–15.

any political party funding provided and the activities of the Gupta family, the findings in the Public Protector's report do suggest that the wealthy Gupta family has had opportunity to improperly influence a number of political decisions.[272]

The Gupta matter provides an example of the kinds of relationships between politicians and wealthy individuals, families and corporations that disclosure provisions might bring to light. The Constitutional Court has recognised that political parties are 'veritable vehicles … chosen for facilitating and entrenching democracy'.[273] South Africa has made international commitments to ensuring access to information about the funding of political parties, and access to information that may be required to combat corruption. Putting these commitments together, especially against backdrop of the Public Protector's findings in relation to the Gupta family, provides a strong argument for why the right to vote, requires that there be access to information about the private funding of political parties.

bb Meaningful Exercise of the Right to Vote

While combating corruption is one important reason for ensuring transparency about the financing of politics, and South Africa is under an international obligation to do so, this is not the only reason that funding transparency is important. It would be foolish to limit reasons for transparency to the combat of corruption, as understood in international law, as this could restrict transparency requirements to relatively narrow circumstances.[274] A legislative provision enacted to create a duty to disclose information about private funding received by political parties, if created only to combat corruption in compliance with international law, would be narrowly formulated because 'corruption' at the international level is generally understood to concern only so-called quid pro quo corruption. If that is the meaning of corruption, then disclosure requirements will only apply to a narrow band of information.

Makinson notes that where funding is provided to a political entity, in *exchange for* a particular favour – say a vote in Parliament to pass legislation that will allow fracking in the Karoo – that would amount to bribery (*quid pro quo* corruption).[275] He points out, however, that those are not the only undesirable political-funding situations: another example would be where funding is legitimately provided in support of a party that has *indicated* that they would support the legislation that will allow fracking in the Karoo. The political party in this second example would not be under any obligation to vote in favour of the legislation allowing for fracking – they would be entitled to vote differently if, for whatever reason, their position on the proposed legislation has changed – but there would be some pressure on them to vote as professed or they may lose future funding from this

[272] Ibid at 14–24.

[273] *Ramakatsa* (note 199 above) at para 67.

[274] J Tham '*My Vote Counts*: International Standards and Transparency of Political Party Funding' (2016) 8 *Constitutional Court Review* 74.

[275] L Makinson 'Interest Groups: What Money Buys' in CJ Nelson, DA Dulio & SK Medvic (eds) *Shades of Gray: Perspectives on Campaign Ethics* (2004) 171 at 175.

funder.[276] Moreover, not only might they lose this particular funder's support, the funder may in fact in future back their opposition instead.[277]

One could also imagine that such a party might lose other funders who may feel that they would rather put their money with someone that sticks to their professed positions.[278] So, taking the hypothetical example of fracking in the Karoo further, let us imagine that there is such proposed legislation before Parliament. Let us suppose further that, in compliance with the participatory duties imposed on it by the Constitution, Parliament invites verbal and written submissions from affected communities. In such circumstances, even if some of the concerns raised and solutions suggested by affected communities are persuasive, there may still be pressure on candidates from parties that received funding for certain positions to vote in line with those professed positions. This means that the community's voice is undercut.

The Constitutional Court has found that South Africans have a right to 'meaningful exercise of choice' and to access to information that will ensure the 'effective exercise of the right to vote'.[279] Members of a political community should therefore be informed, when they cast their ballot to choose representative parties for Parliament, which funders are giving donations to the various parties, and therefore, what sort of pressure those parties will be under from funders with respect to issues that may affect community members. Access to this information should inform public debate in the run-up to elections, ensuring the realisation of the wider political rights in s 19 of the Constitution as well as related rights including the right to freedom of expression. In order to ensure the 'meaningful' exercise of choice within the electoral process therefore, information about private funding received by political parties must be accessible to voters.[280]

One could argue that community members will likely not access funding information, even if that information becomes accessible. There will therefore be no conclusions drawn by them about the influence of donors on various parties contesting the election on particular issues that affect them. However, as noted above, the media and civil society would play a big role in this respect.[281] On topics, such as fracking in the Karoo, the media would be likely to draw attention to the fact that certain interest groups or companies are funding particular parties. Similarly, civil society groups with particular interests, such as in the environment, or health care issues, would be more likely to monitor which funders (with agendas different from their own) are supporting which parties and to make affected communities aware of this. The US Supreme Court, in *Buckley v Valeo*,[282] put it this way:

[276] Ibid.

[277] Ibid at 176.

[278] G Grossman & E Helpman 'Electoral Competition and Special Interest Politics' (1996) 63(2) *The Review of Economic Studies* 265 at 266 and 271.

[279] *Doctors for Life* (note 212 above) at para 106 and *M & G Media Ltd* (note 103 above) at para 10.

[280] Garrett (note 231 above) at 1026–1031 and Hasen (note 261 above) at 570–571.

[281] M Traugott 'The Citizenry: The Electorate's Responsibilities' in Nelson, Dulio & Medvic (note 275 above) at 225 and 235.

[282] Udombana (note 155 above) at 484 and 486; Garrett (note 231 above) at 1025, 1031 and 1045; Hasen (note 261 above) at 567–569 and Griffis (note 264 above) at 798.

> [D]isclosure [of information about funding in politics] provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office. It allows the voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.[283]

The Constitutional Court's holding in *Doctors for Life* that, under international law, South Africans have a right to meaningful exercise of the right to vote is comparable to the information interest recognised by the US Supreme Court.

Taking further the Constitutional Court's recognition in *Doctors for Life* that participation enhances civic dignity,[284] De Vos argues that the rights in the Bill of Rights, and in particular the political rights in s 19 of the Constitution, should be interpreted to increase 'self-determination and self-development'.[285] De Vos contends that the more citizens are able to participate in the political choices that affect their lives the more their civic dignity is promoted and protected, something that is particularly critical in a particularly unequal society.[286] While De Vos uses the argument as a basis for the contention that a 'party law' needs to be enacted to ensure 'intra-party democracy', the argument also lends support for a contention that law needs to be enacted to ensure access to information that will ensure the exercise of a more meaningful vote.[287] Ensuring citizens have a better understanding of the influences that will be brought to bear on the parties listed on the ballot paper will increase self-determination and will consequently increase civic dignity. This is particularly so in the context of inequality of access to politicians, something that is discussed in more detail below.

cc A Counterweight to Secret Lobbying and Influence Peddling

A third reason for ensuring access to funding information concerns access to members of Parliament, providing – in turn – opportunities for the influencing of decision making of members of Parliament. There is a practice, amongst some funders, of contributing to all contenders in an election – irrespective of their policy positions.[288] It is accepted that this practice of 'double-dipping' is aimed at ensuring the funder has access to elected representatives – irrespective of who that may be. This access is in turn sought so that the individual, family or corporation that provided the funding can attempt to influence the decision making of elected officials.[289] Many interest groups in the US in fact provide

[283] *Buckley* (note 160 above) at paras 66–67.

[284] *Doctors for Life* (note 212 above) at para 115.

[285] P De Vos 'It's My Party (And I'll Do What I Want To)?: Internal Party Democracy and Section 19 of The South African Constitution' (2015) 31 *South African Journal on Human Rights* 30 at 34.

[286] Ibid at 33 and 53.

[287] Ibid at 43, 45 and 53–54.

[288] Garrett (note 231 above) at 1029.

[289] J Thurber 'Interest Groups: From Campaigning to Lobbying' in Nelson, Dulio & Medvic (note 276 above) at 151 and 155–156. See also Traugott (note 281 above) at 235.

unding to political figures in order to ensure that they will have an audience with members of the legislature should legislation, which impacts on issues that will have consequences for them and their interests, come before it.[290] It is not inconceivable that such advantages of access to members of Parliament – in order to ensure opportunities to raise views and concerns with them – is a big driver for funding of political parties in South Africa as well.

If funders are, because of the provision of funding, gaining access to, and an audience with, members of Parliament, those funders have an opportunity to influence law-making and policy decisions. Those who do not have the means to contribute, and therefore gain the same access, should at least know about who is funding the parties that they have an opportunity to vote for and therefore whose interests are likely to be advanced by those parties. This would seem to be particularly important in a country with one of the highest levels of inequality in the world.[291]

As pointed out by the Constitutional Court in *Doctors for Life*, South Africa is an extremely unequal society. With the introduction of a constitutional democracy however, we have prioritised key values that go some way to counterbalancing some of this inequality – these include the values of 'openness' and 'participation'. In finding, in *Doctors for Life*, that participation, by affected communities, in the law-making process is required by the Constitution, the Court noted that participation acts 'as a counterweight to secret lobbying and influence peddling.'[292] This purpose is important. While ensuring that voters have access to information about who is funding political parties will not ensure equal access, it will ensure that voters will at least be aware of who will have access to representatives of political parties, on the ballot. As Hasen puts it: '[I]f voters know who puts their money where their mouth is, they will be able to make more intelligent estimates about the policy positions of candidates.'[293]

dd The Right to Vote Guarantees Access to Information about Funding in Politics

There is clearly an information aspect to the right to vote. Moreover, information about private funding provided to political parties is required to be accessible in order to ensure that corruption is combated, the exercise of the right to vote is meaningful and inequality of access to politicians is counter-balanced. In order to give effect to this aspect of the right to vote, the legislature ought to include in electoral legislation, a duty on all parties intending to contest elections, for any legislative body established in terms of the Constitution, to record information about private funding they receive. In line with international best practice, this ought to include information about the kind of funding, the size of the funding and the identity of the funder.

[290] Traugott (note 281 above) at 235.

[291] K O'Regan 'Text Matters: Some Reflections on the Forging of a New Constitutional Jurisprudence in South Africa' (2012) 75 *The Modern Law Review* 1 at 4.

[292] *Doctors for Life* (note 212 above) at para 115.

[293] Hasen (note 261 above) at 571.

6 *Automatic Access to Funding Information*

The next question is whether such information should be proactively available, that is, without the need for a formal request in terms of PAIA. As noted by the minority in *My Vote Counts 1*, the PAIA request process involves one person or institution making one request to each entity holding the information it seeks to access.[294] There are cost implications, as the Regulations to PAIA[295] allow for the levying of a so called 'request' fee as well as an 'access' fee.[296] As the *IDASA* court held that political parties are, in relation to requests about private funding, 'private bodies', the applicable request fee is therefore R55 per request.[297] The access fee is calculated for each request and depends on the amount of time spent searching for the records and the manner in which access is granted. Requesters can be charged R30 per hour, or part hour, reasonably spent searching for a record and R1,10 per page for photocopies. There are further prescribed costs for access in the form of a compact disc (R70) or a copy of an audio recording (R30) etcetera. It is clear that it would be both costly and time consuming to request funding information from every political party contesting elections at every level of government. It is also not inconceivable that some of these requests may be actively refused, or ignored and therefore deemed refused in terms of PAIA.[298]

In circumstances where an access to information request made in terms of PAIA is either actively refused or deemed refused by a 'private body', a requester wishing to challenge the refusal will have to apply to court to have the decision overturned.[299] The high costs associated with litigation are likely to prevent many requesters from challenging a bad decision. Even should one requester gain all this information, they may not necessarily publish the information. In theory, every voter wishing to exercise their right to vote effectively – and every civil society organisation and media house wishing to play a role in the protection and monitoring of the fundamental right to vote in free and fair elections – will need to go through the same time-consuming, costly exercise.

As demonstrated above, there is a clear public interest in access to information about private funding provided to political parties – as it is required to combat corruption, ensure meaningful exercise of the right to vote and to counterbalance the unequal access funders have to politicians. Given the clear public interest in access to this information and given the constraints that the request process will place on gaining access to all the relevant information individually from each of the many parties that will contest elections, it is clear that the duty should be constructed in such a manner that this information must necessarily be made proactively available.

It is worth noting at this stage that there are many varying options with respect to disclosure regulations, such as limiting disclosure to amounts that meet a

294 *My Vote Counts 1* (note 8 above) at para 95.
295 Regulation 223 of 2001 in *Government Gazette* 22125 (19 March 2001).
296 See also PAIA ss 22 and 54.
297 *IDASA* (note 249 above) at paras 51–52.
298 See PAIA s 27.
299 PAIA s 78(2)(d).

minimum threshold.[300] The International IDEA and Clingendael Institute warn that their research shows that regulation of campaign finance can have undesirable consequences if not carefully thought through and adapted to suit the specific circumstances of a country.[301] It would therefore be prudent for Parliament to become involved in giving effect to this critical aspect to the right to vote, as Parliament will be able to properly investigate the different options and to consider their effect in the South African context.

C Conclusion

In this part, I have shown that there is a constitutional obligation, within the right to vote, to ensure transparency with respect to the private funding of political parties. I highlight three reasons, arising out of obligations under international law and from specific content given to political rights by the Constitutional Court and the legislature, for such a duty. The first reason relates to South Africa's obligation under art 10(b) of the AU Corruption Convention to 'incorporate the principle of transparency into funding of political parties'. Access to information about funding makes it possible to identify instances of quid pro quo corruption and knowledge of potential exposure will act as a deterrent to corrupt activity. The second reason is South Africa's duty, under international law, to ensure the exercise of the right to vote is meaningful. Access to funding information about political party funding makes it possible for voters to determine what sort of pressure political parties will be under from funders with respect to issues that may affect community members. This knowledge will inform debate, which in turn will ensure meaningful exercise of the right to vote. The last reason provided relates to the recognition by the Constitutional Court of a duty to ensure that inequality of access to politicians is counter-balanced. Again, knowledge about what sort of pressure political parties will be under from funders with respect to issues that may affect community members provides voters with the opportunity to identify and therefore vote for, the party that will best serve their interests.

I have earlier shown that this aspect of the right to vote should be given legislative effect within the electoral legislative scheme, that is, with the Electoral Act and the LGMEA or the Electoral Commission Act. I have also shown that Parliament ought to be required, in line with its duties in terms of s 7(2) of the Constitution, to make the necessary amendments to the electoral legislation to give effect to this duty.

IV Justifying Limitations on other Constitutional Rights

The South African Constitution recognises no hierarchy of rights. All rights are subject to limitation by laws of general application, provided the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[302] Neither the right to vote nor the right of access

[300] B Clift & J Fisher 'Comparative Party Finance Reform: The Cases of France and Britain' (2004) 10 *Party Politics* 677 at 685.

[301] Briscoe & Goff (note 151 above) at 77.

[302] Constitution s 36.

to information is exempt from limitation. With respect to the right of access to information, the legislature has limited the right within PAIA.[303]

I have established that the right to vote requires proactive access to information about the private funding of political parties, and that this right should be given effect to within the electoral legislative scheme. But that type of proactive access may place limits on other constitutional rights. If it does, would those limitations be constitutionally justifiable? Disclosure of information about private funding received by political parties may in fact impact both on the funder, who may be a natural or a juristic person, and on the political party – a juristic person. I will therefore consider potential limitations both from the point of view of natural persons as donors and from the point of view of juristic persons, as donors and as receivers of donations.

In the US, the Supreme Court in *Buckley v Valeo* held that disclosure requirements can 'seriously infringe on privacy of association and belief guaranteed by the First Amendment'.[304] Should information about peoples' activities, associations and beliefs become public knowledge this may lead to 'harassment or retaliation'.[305] Knowing that this information will become public knowledge may deter some people from making contributions in the first place – affecting both their ability fully to participate in political associations and the political associations' ability to carry out all their activities, or in some cases even to exist at all.[306] The court, however, identified three weighty interests that could justify the infringement of these rights to privacy of association and belief. The first was the fact that the information would enable voters to better understand what positions the recipients of the funding might take on certain specific issues, once in office.[307] Second, disclosure of the information would 'deter actual corruption and avoid the appearance of corruption'.[308] And third, disclosure of information about funding contributions would make it possible to detect violations of legal provisions placing a cap on the amount of money that can be contributed to political parties or candidates.[309] The court, in weighing up the three government interests in disclosure, against the harms of harassment or retaliation and deterrence concluded that while the harms are not insignificant, disclosure was the least restrictive means of achieving the legitimate government interests.[310] The interests sought to be protected through the disclosure requirements outweighed the potential harms.[311]

In the South African context, there are several rights that may potentially be infringed by legislation mandating the disclosure of information about private

[303] PAIA Chapter 4 (in Part 2 of the Act in relation to information held by public bodies and in Part 3 of the Act in relation to private bodies) lays out the reasonable and acceptable limitations on the right of access to information.

[304] *Buckley* (note 160 above) at para 64.

[305] Ibid at para 68.

[306] Ibid at paras 68 and 71.

[307] Ibid at paras 66–67.

[308] Ibid at para 67.

[309] Ibid at para 68.

[310] Ibid.

[311] Ibid at para 72.

funding provided to political parties. From the point of view of the donor, such provisions may affect the right to freedom of expression of the donor, in so far as making a donation is a symbolic expression of support.[312] Similarly, the donor's right to freedom of association may be affected if disclosure provisions will have the effect of deterring the making of donations.[313] Lastly, from both the point of view of the donor as well as the political party, the right to privacy may be infringed by the envisioned provisions.[314] Concerns about the infringement of the rights of freedom of expression and association are related to privacy because what is at stake is an individual's ability to express their very personal views, and, more indirectly, to partake in activities that relate to those views. I will therefore focus my analysis on the possible infringement of the right to privacy, and to what extent such an infringement would be constitutionally justifiable.

A Personal Information of Natural Persons

In addition to the right to privacy being protected by s 14 of the Constitution, the Protection of Personal Information Act[315] (POPI) has been enacted to give effect to that right.[316] As at the date of writing, most provisions of POPI have not commenced. The definition of 'personal information' in POPI, however, closely echoes that in PAIA and therefore protects information rights in relation to similar kinds of information that would be protected from disclosure under PAIA.[317] I will therefore consider the right as provided for in PAIA.

Information about funding, provided by natural persons to political parties, would include information about 'financial transactions' that that person has been involved in. Information about such transactions could be understood – as the *Buckley v Valeo* court held – to disclose information about a person's 'personal opinions, views or preferences'. Information about the financial transactions that a person has been involved in and information about their personal opinions, views or preference are all types of information recognised, in the definition of 'personal information' in s 1 of PAIA, as personal information. Disclosure of information about funding provided by natural persons to political parties would therefore limit the privacy rights of those natural persons.

[312] Constitution s 16.
[313] Constitution s 18.
[314] Constitution s 14.
[315] Act 4 of 2013
[316] POPI preamble and s 2.
[317] There are only two significant differences. The definition of 'personal information', in POPI, specifically includes juristic persons, whereas the definition in PAIA does not. The definition of 'personal information', in PAIA on the other hand, includes information about deceased individuals – for up to 20 years after their death – whereas POPI limits its definition, in relation to natural persons, to living persons. These differences are not material to this discussion because the protection of the privacy rights of juristic persons will be considered separately, and with respect to natural persons we are here considering the more expansive of the two definitions.

B Personal Information of Juristic Persons

Under PAIA, limitations on access to information are recognised, if access to a record may lead to unreasonable disclosure of personal information about a natural person (including a deceased person – for up to 20 years after their death). While the right to privacy in the Constitution – contained in s 14 – extends also to juristic persons, 'personal information' in PAIA is limited, to information about natural persons.[318] While the personal information of juristic persons is not protected as such in PAIA, certain limited aspects of the privacy of juristic persons are protected such as certain commercial information, like trade secrets, and research information where the relevant research was conducted by or on behalf of a juristic person.[319]

This limited protection of the privacy of juristic persons is in line with the Constitutional Court's interpretation of the right to privacy. In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* (*Hyundai*) the Constitutional Court had to consider whether legislative provisions, that enabled certain members of the office of the National Director of Public Prosecutions to search and seize property as part of investigations into certain offences, unreasonably and unjustifiably infringed on the right to privacy and were therefore unconstitutional.[320] In finding that the limitation was in fact reasonable and justifiable and the provisions therefore not unconstitutional, the court considered the meaning and scope of the right to privacy.[321] The Court held that the right to privacy is 'more intense' the more it relates to 'the intimate personal sphere of the life of human beings, and less intense the more it moves away from that core'.[322] The Court further noted that the right to privacy flows from human dignity, and held that, while juristic persons have some right to privacy, they have no 'human dignity' and, therefore, juristic persons' right to privacy will always be 'less intense' than natural persons' rights to privacy. The recognition of the privacy rights of juristic persons is based, not on human dignity directly, but on the fact that absolutely no recognition may lead to state action that would cause 'grave disruptions and would undermine the very fabric of our democratic state'.[323]

1 *The Rights of Juristic Persons as Funders*

Despite PAIA not protecting the 'personal information' of juristic persons directly, it does protect against the disclosure of financial information of a juristic person, in certain circumstances. PAIA prohibits disclosure of financial information of other juristic persons, by state or private entities, and allows for refusal of access by a juristic person to its own financial information, if such disclosure 'would be likely to cause harm to the commercial or financial interests' of that juristic

[318] PAIA ss 34 and 63, and the definition of 'personal information' in PAIA s 1.
[319] PAIA ss 36, 43, 64, 68 and 69.
[320] [2000] ZACC 12, 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) at paras 1 and 3.
[321] Ibid at paras 55 and 58.
[322] Ibid at para 18.
[323] Ibid.

person.[324] Disclosure of information about funding provided by juristic persons to political parties would disclose financial information of that juristic person. Again, the reasoning in *Buckley v Valeo* would seem to apply here too; if there is in fact a real possibility that disclosure of this information may lead to harassment or retaliation, then there is a risk to the commercial or financial interests of that entity. It does seem plausible to imagine that there might be some harassment or retaliation in such circumstances – one might imagine, for example, that some people will cease to do business with an entity, should they learn of that entity's support for a particular political party.[325] Disclosure of information about funding provided by juristic persons to political parties could therefore infringe on this aspect of the privacy rights of juristic persons that are protected in PAIA.

2 *The Rights of Political Parties*

Disclosure of information about funding received by a political party would similarly amount to disclosure of financial information of that political party. Once again, the reasoning in *Buckley v Valeo* would seem to apply here. The disclosure of information may have consequences for funders, and this may lead to some funders withdrawing their financial support from the political party. A withdrawal of financial support would likely cause harm to the financial interests of the political party; emptying out their coffers to the point that they may have to limit their activities, or perhaps even cease to exist entirely. Disclosure of information about funding received by political parties would therefore infringe on this aspect of the privacy rights of political parties, protected in PAIA.

C The Justification for Limitation

The question arises whether the infringement of these privacy rights would be justifiable. If proactive release is required, as I have suggested, in terms of the provisions of an Act falling within the electoral legislative scheme, the limitation would be in terms of a law of general application. It would meet the threshold requirement for the limitation of a constitutional right, in s 36(1) of the Constitution. To further pass the test for justification, the limitation would have to be

> reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.[326]

I now turn to consider, in turn, each part of this test.

[324] PAIA ss 36(1)(b), 64(1)(b) and 68(1)(b).
[325] As has indeed been the case elsewhere; see for example Hasen (note 261 above) at 556.
[326] Constitution s 36(1).

1 *The Nature of the Right*

The right to privacy is an important right, flowing, as it does, from the 'value placed on human dignity by the Constitution'.[327] It is also a right that varies in intensity, depending on how close it comes to the most intimate spheres of the lives of natural persons.

For natural persons, funding of political parties is a form of political activity that takes place quite far outside the most intimate spheres of their lives. The weight of the right is therefore, with respect to natural persons and in relation to information about their funding of political parties of a relatively low intensity. The exception might be circumstances in which only a very small amount is given, in such cases, as noted by Mayer and Hasen, the act of giving is more a symbolic act of support and therefore should be regarded as a more private act.[328] The weight of the privacy right, when what is given is a very large sum, say one million Rand, is therefore lesser than if what is given is just a small amount, say R50.

In relation to juristic persons, the right can never be as intense as it can be for natural persons.[329] The provision of funding will also not ordinarily be directly within the scope of the business of a juristic person – a juristic person that provides funding is usually primarily concerned either with an economic activity or with campaigning for a particular cause.[330] The right is therefore less intense. Juristic persons are also less likely to make smaller sum donations, and therefore, in that sense also, the right will be less weighty in relation to juristic persons making donations.

As the Court held in *Ramakatsa*, political parties are 'indispensible (sic) conduits for the enjoyment of the right given by s 19(3)(a) to vote in elections'.[331] Information about funding received by political parties therefore relates to a constitutional duty, placed on political parties, to ensure they act lawfully, in line with their own constitution and in a manner that ensures that, through them, citizens are able to exercise their right to vote. This right is therefore, with respect to political parties, and in relation to information about funding that these political parties have received, even less intense and in fact rather remote.

2 *The Importance of the Purpose of the Limitation*

Turning to the purpose of the limitation, as noted above, disclosure requirements would be aimed at ensuring that corruption is combated, the exercise of the right to vote is meaningful and that inequality of access to politicians is counter-balanced. These are very important interests aimed at the protection of the key aspects of South Africa's constitutional democracy.

[327] *Hyundai* (note 320 above) at para 18.
[328] Mayer (note 262 above) at 282 and Hasen (note 261 above) at 566.
[329] *Hyundai* (note 320 above) at para 18.
[330] Garrett (note 231 above) at 1027–1033.
[331] *Ramakatsa* (note 199 above) at para 68.

3 *The Nature and Extent of the Limitation*

The limitation comes in the form of a legislative provision requiring that information about funding provided by private persons (natural or juristic) to political parties be recorded and made publicly accessible. In other words, the legislative provision will mandate the disclosure of certain financial information related to donors and political parties. The disclosure, and therefore limitation, is however limited to disclosure of financial information about the funding of political parties. The limitation would therefore be narrow in that it would only relate to one aspect of the financial information of the affected persons.

4 *The Relationship between the Limitation and its Purpose*

It seems plausible to imagine that access to information about the private funding – in large amounts – of political parties would, as the US Court held in *Buckley v Valeo*, make it more likely that 'post-election special favours' (quid pro quo corruption) will be identified. This means that disclosure provisions would have the effect of exposing or even preventing corruption – serving the first of the purposes for the limitation. Smaller contributions however will not attract any favours and so disclosure in the instance of a R50 donation, for instance, would not serve the anti-corruption purpose, whereas disclosure in the instance of a one million Rand donation probably would.[332]

Information about the makers of large contributions will similarly ensure that voters are better informed about the influences under which the parties they are able to vote for will operate if elected. Persons that are able to make large contributions are usually known to the public, or connected with a person or entity that is known to the public or whose interests can be easily established. Voters are therefore able to make certain judgments about the position a political party is likely to take on an issue that affects them.[333] Garret suggests, for instance, that knowing that a teachers' union funds a certain political party will signify to voters the kinds of positions they can expect that party to take on education reforms.[334] Disclosure, in the instance of a large donation of R1 million, would therefore ensure that voters are better informed – serving the purpose of ensuring that the exercise of the right to vote is meaningful. A donation of just R50, however, is less likely to come from someone wealthy, powerful and politically connected about which the public would be able to make educated assumptions if they knew of the donation and the donor. Smaller amounts are also less likely to ensure any access to politicians and so even should a smaller donation come from someone with a public profile, knowing of the donation and knowing the identity of the donor would not provide voters with information that will ensure that the exercise of the right to vote is meaningful.

[332] Hasen (note 261 above) at 566; Garrett (note 231 above) at 1015; and Mayer (note 262 above) at 282–283. See also Briffault (note 167 above) at 990.

[333] Garrett (note 231 above) at 1027 (notes that this is not always the case and identifies three conditions that must be met in order for voters to be able to make the kind of judgment suggested here, based on the information I am arguing should be disclosed).

[334] Ibid at 1028.

For the same reasons discussed in relation to the purpose of ensuring that the exercise of the right to vote is meaningful, disclosure of information about large donations would serve the purpose of counter-balancing inequality. The makers of large donations are likely to gain access to politicians, their wealth securing them such access. The public is however also likely to know more about the economic or ideological interests of the maker of a large donation, and therefore of the interests they will be attempting to protect. Knowing what the interests are that the various political parties are likely to strive to protect will therefore go some way to ensuring that some of the inequality of influence is counter-balanced.

5 *Less Restrictive Means to Achieve the Purpose*

All three of the underlying purposes could be achieved, to some degree, by a total ban on direct private funding, and the introduction of a system whereby tax payers can elect the parties to which they wish a portion of their taxes to be allocated.[335] This would, however, limit significantly the funding available to political parties and would conceivably also therefore significantly limit their activities. Given the critical role political parties play in our democracy this would be a very severe limitation. The disclosure requirements envisioned in this paper would be less restrictive than this alternative proposal, provided they are limited to disclosure in relation to large donations.[336]

Another alternative might be the channelling of donations through a blind trust or government entity, a suggestion first made by Ackerman and Ayres in their book *Voting with Dollars*.[337] Such a model would have donors make the donations to an intermediary who would pass the donation onto the political party without revealing who the donor was, there would be no way for the political party to verify that someone claiming to be the donor really is the donor; this would serve the anti-corruption purpose.[338] Similarly, the purpose of ensuring that inequality of access to politicians is counter-balanced would be achieved because if political parties cannot verify who the bigger donors are there will be no granting of access on the basis of donations. However, unless the intermediary also collects and discloses some information about the donors and their interest there will be no information benefit for voter – voters will not for instance know that businesses in the petroleum industry favour a particular political party.[339] This in turn will mean that the purpose of ensuring that the exercise of the right to vote is meaningful will not be achieved. Should the intermediary also be mandated to collect and distribute non-identifying aggregate data about donations however, this would ensure the informational purpose is met, but would create a significant administrative and therefore cost burden for the intermediary. It is not likely that

[335] This is a variation on a proposal put before the *Buckley v Valeo* court. *Buckley* (note 160 above) at fn 125.

[336] Determination of a threshold amount for donations that are 'large enough' to warrant disclosure falls outside the scope of this paper.

[337] B Ackerman & I Ayres *Voting with Dollars: A New Paradigm for Campaign Finance* (2004).

[338] S Noveck 'Campaign Finance Disclosure and the Legislative Process' (2010) 47 *Harvard Journal on Legislation* 75 at 105.

[339] Ibid at 106–114.

South Africa will be able to afford such a sophisticated alternative model at this stage. I therefore suggest that a disclosure regimen, such as the one suggested in this paper, if limited to disclosures about large donations, is the least restrictive, most effective means of achieving the purpose identified.

6 *Reasonable and Justifiable in an Open and Democratic Society*

The disclosure provisions proposed in this paper would be an affordable solution. The proposed provisions would be aimed at ensuring protection of one of the key aspects of South Africa's constitutional democracy, and while they would infringe on the very important right to privacy, they would not severely affect that right. The limitation is not extensive; the disclosure relates only to the finances of funders and political parties. The limitation – provided the provisions are tailored to only apply to very large donations – is likely to achieve its purposes of ensuring democracy is strengthened through diminishing corruption, the meaningful exercise of the right to vote and through its role as a counter-balance to the inequality of access to politicians. There is no less restrictive means of achieving the purposes of the infringement to a similar degree. The courts are likely to find that the limitation is reasonable and justifiable in terms of s 36 of the Constitution.

D Conclusion

Provisions, enacted to give effect to the right of access to information about private funding of political parties would infringe the privacy rights of funders (whether natural or juristic) and political parties alike. The limitation, however, plays a very important role in circumstances in which the right to privacy has a relatively limited weight despite its importance generally. The infringement – provided the provisions are tailored to only apply to very large donations – would be reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom.

V Conclusion

Current events have highlighted the need for better transparency in South Africa around the influence of money in politics. A recent report by the Public Protector found that certain contracts entered into by Eskom – the state-owned electricity utility – appear to solely benefit a company majority-owned by the wealthy Gupta family.[340] This appears to suggest that the political machinery in South Africa was being used to benefit the Gupta family, and the question is: why? Some of the answers may lie in information about the political funding activities of this wealthy family.

The role of access to information in ensuring transparency, accountability and participation in politics recently came before the Constitutional Court, in *My Vote Counts 1*. In that matter the applicant had sought to argue that legislation should be enacted, in terms of the provisions of s 32(2) of the Constitution, to provide for

[340] Madonsela (note 266 above) at 19–20.

the recording and automatic disclosure of information about the private funding of political parties. The majority of the Court dismissed the application, holding that the principle of subsidiarity prevents the applicant from relying directly on s 32(2) of the Constitution, in light of the fact that PAIA had been enacted in fulfilment of the obligations arising out of that section.

The outcome of this case raises a number of questions that I have attempted to answer in this paper. First, I laid out how it is that the access to information legislative framework in South Africa works. I then demonstrated that PAIA, as the legislation enacted to give effect to the right of access to information, acts as a mechanism for access to information that is recorded in some form or another. Record-creation and record-keeping duties are not, however, contained in PAIA, but arise in other, sector-specific legislation. More specifically, electoral legislation gives indirect recognition to an access to information element to the right to vote by imposing record-creation and record-keeping duties.

The next question is whether information about private funding of political parties is currently accessible. I found that there is no duty in the legislation within the electoral legislative scheme to keep a record of this information. The mechanism for access, PAIA, in order to ensure access, depends on a duty to create records, with this information. But no such duty exists with regard to political party funding. That information is, therefore, not currently accessible.

But does the Constitution require information about private funding of political parties to be accessible? In order to answer this question I first established that, as the right ultimately sought to be protected and exercised meaningfully is the right to vote, the principle of subsidiarity requires reliance on that right, rather than on the right of access to information directly. The proper location for duties to create and keep, and in certain instances to proactively disclose, records of information related to voting is in the legislation enacted to give effect to the right to vote.

In order to determine whether information about private funding of political parties is required for the exercise and protection of the right to vote I analysed the content given to that right under international law, the Constitution, and legislation. I also, briefly considered the case law of the US Supreme Court, related to disclosure and campaign finance. This analysis established three arguments for the recognition of a right of access to information about private funding of political parties as part of the right to vote. The first argument flows from South Africa's obligation under art 10(b) of the AU Corruption Convention to 'incorporate the principle of transparency into funding of political parties'. Access to information about funding makes it possible to identify instances of quid pro quo corruption and knowledge of potential exposure will act as a deterrent to corrupt activity. The second argument relates to South Africa's duty, under international law, to ensure that the exercise of the right to vote is meaningful. Access to information about political party funding makes it possible for voters to determine what sort of pressure political parties will be under from funders with respect to issues that may affect their communities. This knowledge will inform debate, which in turn will ensure meaningful exercise of the right to vote. The last argument relies on the recognition by the Constitutional Court of a duty to ensure that inequality of access to politicians is counter-balanced. Again, knowledge about what sort of

pressure political parties will be under, from funders, with respect to issues that may affect voters and their communities provides voters with the opportunity to identify, and therefore vote for, the party that will best serve their interests.

Formal access to information requests for information about political party funding imposes high costs and a heavy burden. Taken together with the importance of access to this information, this high cost and heavy administration burden necessitates a need for the information to be made proactively available. I therefore concluded that the legislature ought to create a duty within the legislation forming part of the electoral legislative scheme to record information about the private funding of political parties, and to proactively grant access to that information.

Lastly, I considered whether proactive disclosure of this information would place any limits on other constitutional rights. I showed that it would indeed infringe on the privacy rights of donors (natural and juristic) as well as the privacy rights of political parties, as it would amount to a disclosure of their financial information. But that limitation would meet the requirements for justification in s 36(1) of the Constitution. This is because the limitation would be imposed in terms of a law of general application. Moreover, while privacy generally is a very strong right, in these specific circumstances, the right would be less intense in relation to donors that are natural persons, even less intense with respect to donors that are juristic persons and with respect to political parties very remote. The limitation would serve the important purposes of combatting corruption, ensuring the exercise of the right to vote is meaningful, and ensuring that inequality of access to politicians is counter-balanced. The limitation is not excessive because it would impose limited disclosure about financial information related to political party funding only. The limiting provisions are likely to achieve their purposes and the suggested legislative provision would be the least restrictive and most effective means of achieving the purposes of the infringement. I therefore conclude that the limitation would be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

VI Postscript

Since the finalisation of this article there have been two important developments that relate to the arguments put forward in the article. The first is the development, by an ad hoc parliamentary committee, of the Political Party Funding Bill (the PPF Bill).[341] The PPF Bill has recently been adopted by both houses of Parliament, the National Assembly and the National Council of Provinces, and has been sent to the President for assent. The second is the issuance of judgment by the Constitutional Court in the matter of *My Vote Counts NPC v Minister of Justice and Correctional Services & Another*[342] (*My Vote Counts 2*) the sequel to *My Vote Counts 1*. The purpose of this short postscript is not to deal comprehensively with these

[341] B33-2017 (Political Party Funding) available at https://www.parliament.gov.za/storage/app/media/Docs/bill/2abe630b-3d45-40ff-b588-462efa774d75.pdf (accessed on 9 July 2018).

[342] [2018] ZACC 17.

two developments, but merely comment briefly on some aspects that relate to arguments made in the article.

The PPF Bill expressly states that it is aimed at providing for and regulating a variety of sector-specific issues related to political party funding, including the regulation of disclosure of funding information. The Bill contains several record-creation, record-keeping and disclosure requirements. In particular, it requires that information about donations (monetary or otherwise) above a value prescribed by regulation, be disclosed to the Electoral Commission. Further, it requires that the Commission proactively make this information publicly accessible on a quarterly basis. The section dealing with donations specifies that these proactive disclosure requirements do not detract from the right to use the information request apparatus of PAIA (presumably in-between quarterly proactive disclosures, if needed).[343] Further facilitating information access using PAIA, s 12 of the PPF Bill mandates the creation of records of account for all donations, membership fees and levies.

Simultaneously, while the ad hoc parliamentary committee was developing the draft Bill, the Western Cape High Court was hearing arguments in a challenge to the constitutionality of PAIA by the non-profit My Vote Counts. The matter of *My Vote Counts NPC v President of the Republic of South Africa & Others*[344] ('*My Vote Counts HC*') was brought in response to the majority holding in *My Vote Counts 1*. My Vote Counts challenged the constitutionality of PAIA, in so far as it does not provide for record-creation, record-keeping and proactive disclosure of recorded information, related to private political party funding. Ultimately the court, in *My Vote Counts HC*, agreed, finding PAIA to be inconsistent with the Constitution, in so far as it does not provide for record-creation, keeping and disclosure, with respect to the private funding of political parties.[345]

As is required by the Constitution, My Vote Counts approached the Constitutional Court, in *My Vote Counts 2*, for confirmation of the High Court's finding of unconstitutionality of PAIA.[346] The Court was unanimous in its holding that effective exercise of the constitutional right to make political choices, including the right to vote, requires access to information about private funding received by political parties and independent candidates that contest elections.[347]

The Court confirmed that the right to vote, is a right to an informed vote.[348] In particular, it found that information about private funding should be accessible, because of what it will tell voters about the parties and candidates that are contesting the elections.[349] Such information should also be accessible, the Court held, for the additional reasons that, access will go some way towards combatting corruption and the appearance of corruption as well as towards the prevention of

[343] PPF Bill s 9.

[344] [2017] ZAWCHC 105, 2017 (6) SA 501 (WCC), [2017] 4 All SA 840 (WCC).

[345] Ibid at paras 69 and 75.

[346] See ss 167(5) and 172(2)(a) of the Constitution.

[347] *My Vote Counts 2* (note 344 above) at paras 33, 40–52 and 92 (The majority noted, in para 29 of the judgment, that even though independent candidates do not currently contest national and provincial elections, this is constitutionally speaking possible, despite a lack of legislative facilitation.)

[348] Ibid at paras 33–39 and 46.

[349] Ibid at paras 3 and 38–40.

the exercise of undue influence by donors.[350] The Court held that the right to an informed vote, as it encompasses a right of access to information about private funding of political parties and independent candidates, necessarily incorporates a duty to record, keep and disclose records of private funding information.[351]

The majority judgment further held that private funding information should be accessible not only to voters but also to other parties and candidates contesting elections, to academia and to the media. This right, the majority found, derives from these persons' and entities' right to freedom of expression, as an essential part of meaningful participation in the electoral process.[352] The minority concurring opinion, while agreeing these persons and entities also have a right of access to private funding information, found it unnecessary to connect the right to vote with freedom of expression in this way. This, the minority noted, is because, if viewed as a right of the citizenry generally, rather than as an individualised right, the right to vote has a participatory element that would allow for access to funding information by non-voters acting in the interest of the citizenry.[353]

Despite focusing its discussion on an informed right *to vote*, the court shows its confusion about the role of the section 32 constitutional right of access to information and PAIA by then turning, in the majority judgment, to considering whether *PAIA* makes provision for the recording, of information about private funding in politics, and for the safe-keeping and disclosure of such records. As part of this analysis the judgment notes that PAIA makes provision for requests to 'public' and 'private' bodies. As the term 'public body' is clearly intended to relate to the state, the judgment then goes on to consider the definition in PAIA for 'private body'. The judgment holds that the concept 'private body', as defined, would exclude independent candidates and political parties that are not juristic persons from its ambit; this despite the corresponding constitutional right, in section 32(1)(b), applying to all non-state persons. The Court therefore held that PAIA is constitutionally deficient in so far as the exclusion from its ambit, of independent candidates and political parties that are not juristic persons, leads to it not facilitating access to information requests to these persons and entities.[354]

The majority judgment finds that PAIA imposes no record-creation or record-keeping duties, and that certain provisions in PAIA, allowing for refusal of access to information, might apply to private funding information. The judgment therefore holds that PAIA is deficient is so far as it does not provide for the recording, preservation and disclosure of information about the private funding of political parties and independent candidates.[355] Showing further confusion about the role of PAIA (as a request mechanism) the majority judgment, without making any findings with respect to unconstitutionality, notes that certain aspects of PAIA 'stands in the way' of access to information that is required for the exercise of an informed vote. In particular, the judgment notes that the

[350] Ibid at paras 40–52.
[351] Ibid at para 69.
[352] Ibid at paras 53–58.
[353] Ibid at para 95.
[354] Ibid at paras 61–63 and 96.
[355] Ibid at paras 66–68.

laboriousness of the request procedure, the need to give reasons for a request for information from a non-state entity and the need to pay access and request fees hinders easy access to this information.[356] The Court appears to find this problematic because it takes the position that information that is 'self-evidently' required in order to 'properly exercise' a right (as it concludes is the case with respect to private funding information and the right to vote) should be accessible without the need to provide reasons for access.[357] Despite not being prepared to hold that private funding information must be made accessible in a 'continuous and systematic' manner, the Court does find that the information must be 'disclosable in a reasonably accessible manner … that is not to be paid for'.[358] 'Reasonably accessible', the majority indicates, would encompass the information being 'free-flowing'.[359] As noted in the minority judgment, it is hard to imagine how this could be facilitated if not systematically and continuously.[360]

Most significantly, in the context of this article, the Court's failure, again, to engage properly with its own doctrine of constitutional subsidiarity leads to mixed messages about the role of the s 32 right of access to information, and PAIA as the legislation giving effect to it. The Court appears, from the outset, to accept that PAIA may not be the legislation best suited for the facilitation of the relevant record-creation, record-keeping and disclosure duties. This it does when it notes that Parliament may choose to fulfil its duties, in relation to an informed right to vote, by amending PAIA or through PAIA together with other legislation or even through 'a different mechanism altogether.'[361] The Court's failure, in particular, to apply the part of the doctrine that comes into operation where more than one right is implicated, leads to the curious situation that despite finding PAIA to be unconstitutional and invalid (with respect to its failure to make provision for record-creation, keeping and disclosure, in relation to private political funding information) and despite ordering PAIA's amendment, the door is left open for alternative, legislatively determined remedies. The PPF Bill, if enacted, could likely be regarded as remedying the identified defects in PAIA,[362] despite no change being made to PAIA – which would support the argument that PAIA was never the location for sector-specific record-creation, record-keeping and disclosure requirements.

[356] Ibid at paras 70–71.
[357] Ibid at para 71.
[358] Ibid at para 72.
[359] Ibid at para 70.
[360] Ibid at para 94.
[361] Ibid at para 17.
[362] Excepting the finding in relation to the exclusion of some persons from the ambit of PAIA in circumstances where it is operating as a request mechanism. This finding, however, has to do with PAIA being used as the request mechanism Parliament clearly intended it to be.